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*Washington, Wednesday, April 12, 1939*

## *The President*

### EXECUTIVE ORDER

EXTENDING THE PROVISIONS OF THE CIVIL SERVICE RETIREMENT ACT TO CERTAIN FEDERAL EMPLOYEES, AND AMENDING CIVIL SERVICE RULE II

By virtue of the authority vested in the President by section 3 of the Civil Service Retirement Act of May 29, 1930 (46 Stat. 470, U. S. C., title 5, sec. 693), and by section 1753 of the Revised Statutes of the United States (U. S. C., title 5, sec. 631), and the Civil Service Act of January 16, 1883 (22 Stat. 403), it is hereby ordered as follows:

The provisions of the Civil Service Retirement Act of May 29, 1930 (46 Stat. 470), are hereby extended to apply (1) to all Federal employees who have been or may be appointed to any position named in Schedule A or Schedule B of the Civil Service Rules, or to any position excepted by law or Executive order from the operation of the Civil Service Act and Rules, provided that such employees have been or shall be appointed pursuant to the provisions of subdivision (d) of section 3 of Civil Service Rule II, and (2) to all employees who have been or may be accorded a classified status while serving in such positions.

Subdivision (d) of section 3 of Civil Service Rule II[1] is hereby amended to read as follows:

"The proper appointing officer may fill any position named in Schedule A or Schedule B, or any other excepted position, as classified positions are filled, in which case the person so appointed shall be eligible for transfer, reinstatement, or promotion to positions in the classified service, subject to the provisions of these rules. The encumbent of any excepted position so filled will not be entitled to protection against removal afforded by these rules."

The issuance of this order is recommended by the Civil Service Commisison.

[1] 3 F. R. 1519 DI.

Executive Order No. 3375 of December 24, 1920, extending the provisions of the Civil Service Retirement Act of May 22, 1920, to certain Federal employees, is hereby superseded.

This order shall become effective on May 1, 1939.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
*April 10, 1939.*

[No. 8083]

[F. R. Doc. 39-1214; Filed, April 11, 1939; 11:34 a. m.]

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APRIL 5, 1939.

MY DEAR MR. SECRETARY: Pursuant to the authority conferred upon me by the Act to amend the Tariff Act of 1930, approved June 12, 1934 (48 Stat. 943), as extended by the Joint Resolution approved March 1, 1937 (50 Stat. 24), I hereby direct that the duties proclaimed on this date in connection with the trade agreement signed on April 1, 1939 with the Turkish Republic, and all other duties heretofore proclaimed in connection with trade agreements (other than the trade agreement with Cuba signed on August 24, 1934, the trade agreement with Nicaragua signed on March 11, 1936 and the trade agreement with Czechoslovakia signed on March 7, 1938, as amended) entered into under the authority of the said Act, as originally enacted or as extended, shall be applied on and after the effective date of such duties, or, as the case may be, shall continue to be applied on and from the date of this letter, to articles the growth, produce, or manufacture of all foreign countries, except as otherwise hereinafter provided, whether imported directly or indirectly, so long as such duties remain in effect and this direction is not modified.

Such proclaimed duties shall be applied to articles the growth, produce, or manufacture of Cuba in accordance with the provisions of the trade agreement with Cuba signed on August 24, 1934.

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THE PRESIDENT



RULES, REGULATIONS, ORDERS



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FEDERAL REGISTER

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Because I find as a fact that the treatment of American commerce by Germany is discriminatory, I direct that such proclaimed duties shall not be applied to products of Germany. Products of Bohemia, Moravia and Slovakia, now under the de facto administrative control of Germany, shall be regarded as products of Germany for the purposes of this paragraph.

My letter addressed to you on November 25, 1938,[1] with reference to duties heretofore proclaimed in connection with trade agreements signed under the authority of the Act of June 12, 1934 is hereby superseded.

[1] 3 F. R. 2808 DI.

You will please cause this direction to be published in an early issue of the weekly Treasury Decisions.

Very sincerely yours,

[SEAL] FRANKLIN D ROOSEVELT

The Honorable
HENRY MORGENTHAU, Jr.,
*Secretary of the Treasury.*

[F. R. Doc. 39-1211; Filed, April 11, 1939; 11:00 a. m.]

## *Rules, Regulations, Orders*

### TITLE 6—AGRICULTURAL CREDIT

### FARM CREDIT ADMINISTRATION

[FCA 131]

THE FEDERAL LAND BANK OF HOUSTON, FEES CHARGED IN CONNECTION WITH APPLICATIONS FOR LAND BANK AND LAND BANK COMMISSIONER LOANS; AMOUNT; REFUND; COST AND CHARGES IN CONNECTION WITH REAPPRAISAL

Sec. 30.1 of Title 6, Code of Federal Regulations, is amended to read as follows:

"SEC. 30.1 *Fees charged in connection with applications for land bank and Land Bank Commissioner Loans; amount; refund; cost and charges in connection with reappraisal.* An application fee of $15.00 is charged by The Federal Land Bank of Houston for the first $1,000.00, or less, of the amount applied for, plus $1.00 for each additional $1,000.00 or fractional part thereof. A fee of $10.00 is collected at the time the application is submitted for a loan of $5,000.00 or less. If the application is rejected by the bank or withdrawn by the applicant before appraisal by a land bank appraiser, the $10.00 initial fee is refunded to the association for the applicant. If the application is rejected by the bank or withdrawn by the applicant after appraisal by a land bank appraiser, the $10.00 initial fee is retained by the bank and applied on expenses. If the application is rejected by the bank or withdrawn by the applicant after the land has been appraised by a land bank appraiser and the title has been examined, a charge is set up against the applicant for an additional fee in keeping with the regular fee schedule to cover the cost of services rendered. If the application results in a closed loan, the remainder of the fee, under the bank's schedule based on the amount of the loan closed, is deducted from the loan proceeds.

"If the application is for a loan in excess of $5,000.00, the bank collects the full fee provided for in the regular schedule.

"If the application is rejected by the bank or withdrawn by the applicant before the security is appraised by the land bank appraiser, the entire fee is returned to the association for the applicant. If the application is rejected by the bank or withdrawn by the applicant after appraisal and before examination of title, the sum of $5.00 of the application fee is returned to the association for the applicant. The entire fee is retained by the bank if the application is rejected or withdrawn by the applicant after appraisal and examination of title. If the application results in a closed loan for less than the amount applied for, the fee is based on the amount of the loan closed and any excess is refunded to the association for the applicant.

"If the applicant is a nonresident of Farm Credit District No. 10, the bank requires an additional fee of $7.50 to cover expenses of investigation of the personal risk of applicant. In event the full amount of the additional fee collected is not expended, the unused portion is refunded to the association for the applicant.

"A reappraisal fee of $12.50 is collected where reappraisal is requested by an applicant. If the reappraisal is justified, the fee is refunded to the association for the applicant.

"Reappraisal fee of $12.50 is collected to cover cost and expense incident to supplemental inspecton by land bank appraiser to establish to the satisfaction of the bank that grantor has relinquished possession to land before loan is closed. A reappraisal fee of $12.50 is collected to cover cost and expense incident to a supplemental inspection and appraisal of improvements by a land bank appraiser when all or a portion of the loan proceeds are used for construction of improvements built subsequent to the original appraisal.

"When applications are submitted for the division of an existing loan or loans, a flat fee of $15.00 is charged in connection with each application. If additional funds are applied for in connection with an application for the division of a loan or loans, an additional fee of $1.00 is charged for each additional $1,000.00 or fractional part thereof, and if an additional loan is made, that portion of the additional fee retained by the bank is based on the additional funds loaned. The fees should accompany the applications to the bank.

"In case of a substitute or amended application where the property offered as security has already been appraised, an additional fee of $10.00 is charged by the bank in each of the following types of cases:

"(1) a substitute application is submitted or an old one is amended in order to offer additional security;

"(2) a portion of the security is withdrawn from the application;

"(3) one person makes an application, the proffered security is sold and the new owner desires to substitute his application for the original application."

(Sec. 13 "Ninth," 39 Stat. 372, 12 U. S. C. 781 "Ninth"; Sec. 32, 48 Stat. 48, as

amended, 12 U. S. C. 1016; Sec. 33, 48 Stat. 49, as amended, 12 U. S. C. 1017; Sec. 1, 48 Stat. 344, 12 U. S. C. 1020; Sec. 2, 48 Stat. 345, 12 U. S. C. 1020a; 6 CFR 19.4019) [Res. Ex. Com. March 3, 1939]

[SEAL] THE FEDERAL LAND BANK OF HOUSTON,
By A. P. GRAVES,
*Vice President.*

[F. R. Doc. 39-1224; Filed, April 11, 1939; 12:42 p. m.]

## TITLE 7—AGRICULTURE

### AGRICULTURAL ADJUSTMENT ADMINISTRATION

[ACP-1939-12] Issued April 10, 1939

1939 AGRICULTURAL CONSERVATION PROGRAM BULLETIN

Pursuant to the authority vested in the Secretary of Agriculture under sections 7 to 17, inclusive, of the Soil Conservation and Domestic Allotment Act, as amended, the 1939 Agricultural Conservation Program Bulletin is hereby amended as follows:

(1) Item (xvii) of section 701.2 (d) (4) is hereby amended to read as follows:

Flax planted for any purpose except when used as a nurse crop for biennial or perennial legumes or perennial grasses of which a good stand is established in 1939 or, in areas designated by the Administrator as areas where it is not practicable to use flax as a nurse crop, when matched acre for acre by a good stand of biennial or perennial legumes seeded alone in 1939 or perennial grasses seeded alone after November 1, 1938 or in 1939; *Provided,* That in cases where a good stand of such legumes or grasses is not on the farm at the time of final checking of performance, a good stand of such legumes or grasses shall be considered as having been established if the county committee, pursuant to instructions issued by the Agricultural Adjustment Administration, finds that such legumes or grasses were seeded in workmanlike manner and (a) failure to secure and maintain a good stand was due to flood or drought conditions which prevented the establishment of a good stand on farms generally in the community, or (b) failure to have a good stand was due to grasshoppers or other insects and the farm operator has made every reasonable effort to prevent damage by such insects including in any event cooperation in the insect control programs of the Bureau of Entomology and Plant Quarantine in any area in which such programs are in effect.

(2) Item (xx) of section 701.2 (d) (4) is hereby amended to read as follows:

Wheat on a non-wheat-allotment farm, oats, barley, rye, emmer, speltz, or mixtures of these crops (including mixtures containing wheat on any farm) harvested for hay except (1) when such crops are used as nurse crops for legumes or perennial grasses of which a good stand is established in 1939 and the nurse crop is cut green for hay, or (2) when such crops are grown in a mixture containing at least 25 percent by weight of winter legumes: *Provided,* That in cases where a good stand of such legumes or grasses is not on the farm at the time of final checking of performance, a good stand of such legumes or grasses shall be considered as having been established if the county committee, pursuant to instructions issued by the Agricultural Adjustment Administration, finds that such legumes or grasses were seeded in workmanlike manner and (a) failure to secure and maintain a good stand was due to flood or drought conditions which prevented the establishment of a good stand on farms generally in the community, or (b) failure to have a good stand was due to grasshoppers or other insects and the farm operator has made every reasonable effort to prevent damage by such insects including in any event cooperation in the insect control programs of the Bureau of Entomology and Plant Quarantine in any area in which such programs are in effect:

Done at Washington, D. C., this 10th day of April, 1939. Witness my hand and the seal of the Department of Agriculture.

[SEAL] H. A. WALLACE,
*Secretary of Agriculture.*

[F. R. Doc. 39-1218; Filed, April 11, 1939; 12:35 p. m.]

## TITLE 24—HOUSING CREDIT

### HOME OWNERS' LOAN CORPORATION

TITLE 24, HOUSING CREDIT, CHAPTER IV, PART 402, LOAN SERVICE

DELINQUENT TAXES

*Amending Part 402 of Title 24 of the Code of Federal Regulations*

Section 402.6 is amended to read as follows:

The Loan Service Division shall be responsible for causing home owners to pay delinquent taxes, assessments, other governmental levies or charges, or ground rents. (Effective April 25, 1939)

(Home Owners' Loan Act of 1933, 48 Stat. 129, 132 as amended by Section 13 of the Act of April 27, 1934, 48 Stat. 647; 12 U. S. C. 1463 (a), (k))

[SEAL] R. L. NAGLE,
*Secretary.*

[F. R. Doc. 39-1217; Filed, April 11, 1939; 12:20 p. m.]

TITLE 24, HOUSING CREDIT CHAPTER IV, PART 402, LOAN SERVICE

DELINQUENT TAXES

*Amending Part 402 of Title 24 of the Code of Federal Regulations*

Section 402 is amended by the addition of the following Section to be numbered Section 402.14 to read as follows:

SEC. 214. In cases where the Loan Service Division considers it desirable, arrangements may be made with home owners on an approved form for a Special Deposits Account for the purpose of accumulating funds for the payment of taxes, assessments, other levies or charges, ground rents, or insurance premiums. (Effective April 25, 1939)

(Home Owners' Loan Act of 1933, 48 Stat. 129, 132 as amended by Section 13 of the Act of April 27, 1934, 48 Stat. 647; 12 U. S. C. 1463 (a), (k))

[SEAL] R. L. NAGLE,
*Secretary.*

[F. R. Doc. 39-1216; Filed, April 11, 1939; 12:20 p. m.]

TITLE 24, HOUSING CREDIT CHAPTER IV, PART 408, ACCOUNTING

APPLICATION OF REMITTANCES AND MISCELLANEOUS CREDITS

*Amending Part 408 of Title 24 of the Code of Federal Regulations*

Section 408.00 (g) and Section 408.00 (l) are amended to read as follows:

SEC. 800 (g) Remittances received from a home owner for application to his account, and miscellaneous credits for which no other application is directed, shall be posted to the home owner's special deposits account up to the amount of the accrued and unpaid balance thereon before crediting any portion of such remittance or miscellaneous credit to the related loan or vendee account. Remittances, and miscellaneous credits for which no other application is directed, which are applied to the loan or vendee account shall be distributed first to interest and second to principal, without segregation on the individual ledger sheets between the primary obligation, reconditioning loan or advance elements of the consolidated balance of either interest or principal. When requested by the Legal Department, the Accounting Section shall prepare statements of account showing the elements of the consolidated account and a segregation of the amounts posted to the consolidated interest and consolidated principal balances applicable to each such element, unless, under direction of Regional Counsel, the statement is required to reflect a different segregation of credits or application of payments.

SEC. 800 (1) Funds received by the Corporation from partial releases, grants of easements and flowage rights, insurance losses, mineral deeds, transactions affecting oil, gas or mineral interests, sales of timber, condemnation awards under decree or judgment of a court or by agreement, substitution of security, additional security, other transactions which otherwise reduce or diminish the security held by the Corporation or the property sold by it and any other credits to borrowers' or vendees' accounts other than repayments, are defined as "miscellaneous credits", and the net amount thereof shall be applied to the appropriate account (special deposits, interest, principal or other sums owing to the Corporation) in such manner, consistent with law and the provisions of the loan or sales instrument or other agreement as the General Manager, with the advice of the General Counsel, shall direct. (Effective April 25, 1939)

(Home Owners' Loan Act of 1933, 48 Stat. 129, 132 as amended by Section 13 of the Act of April 27, 1934, 48 Stat. 647; 12 U. S. C. 1463 (a), (k))

[SEAL] R. L. NAGLE,
*Secretary.*

[F. R. Doc. 39–1215; Filed, April 11, 1939; 12:20 p. m.]

## TITLE 43—PUBLIC LANDS

### DEPARTMENT OF THE INTERIOR

MODIFICATION—CALIFORNIA GRAZING DISTRICT NO. 1 AND NEVADA GRAZING DISTRICT NO. 3

APRIL 6, 1939.

Under and pursuant to the provisions of the act of June 28, 1934 (48 Stat. 1269), as amended June 26, 1936 (49 Stat. 1976), and subject to the limitations and conditions therein contained, Nevada Grazing District No. 3, established by a Departmental order approved November 3, 1936, is hereby augmented to include the following-described land, which is hereby excluded from California Grazing District No. 1, established April 8, 1935:

CALIFORNIA

*Mount Diablo Meridian*

T. 11 N., R. 19 E., E½ sec. 1, E½ sec. 12, E½ sec. 13, secs. 24, 25, and 36;
T. 12 N., R. 19 E., all of the township not within a national forest;
T. 10 N., R. 20 E., secs. 3 to 12, inclusive, N½ sec. 13, secs. 14 to 17, inclusive, E½ sec. 20, secs. 21 and 22, W½ sec. 23, NW¼ sec. 26, N½ sec. 27, N½ sec. 28, NE¼ sec. 29;
T. 11 N., R. 20 E., all of the township not within a national forest;
T. 8 N., R. 21 E., sec. 1;
T. 9 N., R. 21 E., secs. 1 to 3 and secs. 10 to 15, inclusive, E½ sec. 22, secs. 23 to 26, inclusive, E½ sec. 27, E½ sec. 34, secs. 35 and 36;
T. 10 N., R. 21 E., sec. 7;
T. 8 N., R. 22 E., secs. 1, 12, 13, 14, 23, 24, 25, 26, 35, and 36;
T. 9 N., R. 22 E., all;
T. 10 N., R. 22 E., all of the township not within a national forest;
T. 8 N., R. 23 E., SW¼ sec. 3, secs. 4 to 9, inclusive, W½ sec. 10, W½ sec. 15, secs. 16 to 21, inclusive, W½ sec. 22, secs 28 to 32, inclusive;
T. 9 N., R. 23 E., all of the township not within a national forest;
T. 4 N., R. 24 E., secs. 1 and 2, N½, SE¼ sec. 11, secs. 12 and 13, E½ sec. 14, NE¼ sec. 23, secs. 24, 25, and 36;
T. 5 N., R. 24 E., secs. 13, 24, 25, 26, 35, and 36;
T. 2 N., R. 25 E., secs. 1, 2, 11, 12, 13, and 24;
T. 3 N., R. 25 E., secs. 1 to 4, secs. 9 to 16, secs. 21 to 27, and secs. 34 to 36, inclusive;
T. 4 N., R. 25 E., all;
T. 5 N., R. 25 E., lots 1, 2, 3, and 4 sec. 1, lots 1, 2, 3, and 4 sec. 2, lots 1, 2, 3, and 4 sec. 3, lots 1, 2, 3, and 4 sec. 4, SE¼ sec. 7, S½ sec. 8, secs. 9 to 36, inclusive;
T. 2 N., R. 26 E., secs. 1 to 11 and secs. 14 to 23, inclusive;
T. 3 N., R. 26 E., all;
T. 4 N., R. 26 E., all;
T. 5 N., R. 26 E., all;
T. 6 N., R. 26 E, secs 32 to 36, inclusive;
T. 2 N., R. 27 E., secs. 1 and 6 (fractional);
T. 3 N., R. 27 E., all;
T. 4 N., R. 27 E., all;
T. 5 N., R. 27 E., all;
T. 2 N., R. 28 E., secs. 1 to 17, inclusive;
T. 3 N., R. 28 E., all;
T. 4 N., R. 28 E., secs. 4 to 10, lots 1, 2, 3, 4, W½SW¼, SE¼SW¼ sec. 14, secs. 15 to 22, W½ sec. 23, secs. 25 to 36, inclusive;
T. 5 N., R. 28 E., all;
T. 2 N., R. 29 E., secs. 4 to 8, inclusive, N½, SW¼ sec. 9, W½ sec. 17, sec. 18;
T. 3 N., R. 29 E., secs. 4 to 9, secs. 16 to 21, and secs. 28 to 33, inclusive;
T. 4 N., R. 29 E., sec. 31.

(Sgd) HARRY SLATTERY,
*Acting Secretary of the Interior.*

[F. R. Doc. 39–1210; Filed, April 11, 1939; 10:41 a. m.]

## TITLE 49—TRANSPORTATION AND RAILROADS

### INTERSTATE COMMERCE COMMISSION

ORDER

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 29th day of March, A. D. 1939.

[Ex Parte No. 72 (Sub-No. 1)]

IN THE MATTER OF REGULATIONS CONCERNING THE CLASS OF EMPLOYEES AND SUBORDINATE OFFICIALS THAT ARE TO BE INCLUDED WITHIN THE TERM "EMPLOYEE" UNDER THE RAILWAY LABOR ACT

*It appearing*, That certain employee organizations have filed petitions requesting this Commission to amend or interpret its orders defining and classifying employees and subordinate officials under paragraph 5 of section 1 of the Railway Labor Act, as amended, so as to include the work of the persons described in the next succeeding paragraph hereof, and full investigation of the matters and things involved having been made, and the division having, on September 29, 1938, made and filed a report [1] containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and said division after oral hearing having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said supplemental report and said report of September 29, 1938, are hereby referred to and made a part hereof:

*It is ordered*, That the work defined as that of an employee or subordinate official in orders of this Commission now in effect be, and it is hereby, amended and interpreted so as to include the work of persons designated by terms such as "red caps", station attendants, station porters, parcel porters, ushers, chief ushers, and captains, whose duties consist of or include the carrying of passengers' hand baggage and otherwise assisting passengers at passenger stations and other places on carriers' premises and equipment, in cities of 100,000 population or less as well as in cities of over 100,000 population, based on the 1930 census, whether such persons received a stated compensation or are entirely dependent upon tips, and brings the persons performing such work within the term "employee" as used in the fifth paragraph of section 1 of the Railway Labor Act, as amended.

By the Commission, division 3.

[SEAL] W. P. BARTEL,
*Secretary.*

[F. R. Doc. 39–1222; Filed, April 11, 1939; 12:40 p. m.]

[1] Filed as part of document.

ORDER

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 29th day of March, A. D. 1939.

[Ex Parte No. 72 (Sub-No. 1)]

IN THE MATTER OF REGULATIONS CONCERNING THE CLASS OF EMPLOYEES AND SUBORDINATE OFFICIALS THAT ARE TO BE INCLUDED WITHIN THE TERM "EMPLOYEE" UNDER THE RAILWAY LABOR ACT

*It appearing*, That the Railroad Yardmasters of America has requested this Commission to interpret its orders defining and classifying employees and subordinate officials and to determine the status of general yardmasters, terminal trainmasters, trainmasters, and their respective assistants employed on the Denver and Rio Grande Western Railway Company, Wilson McCarthy and Henry Swan, Trustees, hereinafter referred to as the Rio Grande, and full investigation of the matters and things involved having been made, and the Commission by Division 3 having, on the date hereof, made and filed a report [1] containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*It is ordered*, That the work defined as that of an employee or subordinate offi-

cial in the orders of this Commission now in effect be, and it is hereby interpreted, in accordance with the findings in said report, as including the work of general yardmasters, terminal trainmasters, trainmasters, and their respective assistants at Denver, Pueblo, Grand Junction, and Salida, Colo., and Salt Lake City and Helper, Utah, points on the Rio Grande, so as to bring them within the definition of the term "employee" in the fifth paragraph of section 1 of the Railway Labor Act, as amended June 21, 1934, but this shall not be construed as preventing the Rio Grande from designating one general yardmaster at Denver, Colo., and one at Salt Lake City, Utah, with authority to employ, dismiss, or discipline employees, and thus stamp them as officials.

By the Commission, division 3.

[SEAL] W. P. BARTEL, *Secretary.*

[F. R. Doc. 39-1223; Filed, April 11, 1939; 12:40 p. m.]

## *Notices*

### DEPARTMENT OF AGRICULTURE.

#### Food and Drug Administration.

IN THE MATTER OF THE PUBLIC HEARING FOR PURPOSE OF RECEIVING EVIDENCE UPON BASIS OF WHICH REGULATIONS MAY BE PROMULGATED (A) FIXING AND ESTABLISHING DEFINITION AND STANDARD OF IDENTITY, STANDARD OF QUALITY, AND STANDARD OF FILL OF CONTAINER, FOR CANNED TOMATOES; AND (B) SPECIFYING FORM AND MANNER OF LABEL STATEMENTS FOR SUCH CANNED TOMATOES WHICH FALL BELOW SUCH STANDARD OF QUALITY, AND SUCH STANDARD OF FILL OF CONTAINER

REPORT OF PRESIDING OFFICER, SUGGESTED FINDINGS OF FACT, CONCLUSION AND ORDER; IN RE: STANDARD OF IDENTITY FOR CANNED TOMATOES

*General Statement*

1. In pursuance of the authority of subsection (e), Section 701 of the Federal Food, Drug, and Cosmetic Act [Sec. 701, 52 Stat. 1055; 21 U. S. C. 371 (e)], the Secretary of Agriculture, on his own initiative, published, on December 15, 1938 (which appeared at volume 3, page 3009 of the FEDERAL REGISTER), a notice of a public hearing to be held on January 19, 1939, in Room 3036, Department of Agriculture, South Building, Independence Avenue, between 12th and 14th Streets, S. W., Washington, D. C., for the purpose of receiving evidence upon the basis of which regulations might be promulgated (a) fixing and establishing a definition and standard of identity, a standard of quality, and a standard of fill of container for canned tomatoes; and (b) regulations specifying the form and manner of label statements for canned tomatoes which fall below such standard of quality and such standard of fill of container. This notice contained a proposal in general terms for a reasonable definition and standard of quality, and standard of fill of container for canned tomatoes, and the form and manner of label statements for such food which falls below such standards of quality and fill of container, together with a provision for labeling of tomatoes which (1) fall below the standard of quality, and (2) fall below the standard of fill of container. The notice designated John McDill Fox as the presiding officer for said hearing. Thereafter, a public hearing was called at the time and place therein designated, and was adjourned to 2:45 p. m., on the same date, and said John McDill Fox served as presiding officer. (Government's Exhibit No. 1.)

2. Said hearing was concluded at 9:10 p. m., on January 19, 1939. All interested persons were notified, pursuant to the rules of procedure, of their opportunity to file proposed findings of fact and argument.

3. At such hearing the Presiding Officer announced that he would first hold a hearing on identity and immediately subsequent he would hold hearings on quality, fill of container, and substandard labeling.

4. The Presiding Officer, therefore, makes this report and suggests that the Secretary make, on the basis of the substantial evidence contained in the record, the findings of fact herein contained, the conclusions herein suggested, and as so found, to order the promulgation of the regulation suggested herein.

5. The proposal, as it appeared in the FEDERAL REGISTER on December 15, 1938, concerned itself, *inter alia*, with a proposed reasonable definition and standard of identity for the canned food product commonly known as tomatoes. It read as follows:

Tomatoes consist of one of the following optional tomato ingredients:

(1) (a) Clean, mature, red tomatoes which are sound or with imperfections removed by trimming, and which have been peeled and cored, with (b) the liquid obtained from such tomatoes in peeling, coring, trimming, and packing; or

(2) Tomato ingredient (1) (a) with a strained mixture consisting of clean, sound tomato trimmings and liquid obtained from tomato ingredient (1) (a) in peeling, coring, and trimming;

With or without one or more of the optional added ingredients:

(a) Salt.
(b) Sweet basil leaves.

Sealed in a container and processed by heat to prevent spoilage.

When optional tomato ingredient (2) or optional added ingredient (b) is used, that fact shall be stated on the label. (Form of declaration to be later specified.)

6. Within the time so provided, various interested persons filed proposed findings of fact, based upon the evidence adduced at the hearing, which if granted, would modify the proposal originally printed in the FEDERAL REGISTER. These proposed findings of fact concerned: (1) The variety of tomatoes used for canning. (2) The method of removing imperfections. (3) The nature of the liquid used to fill the interstices around tomato meats.

7. The controversy of testimony centered on the use of the phrase "tomatoes with puree from trimmings".

8. The testimony described in detail what canned tomatoes were understood to be; what was the background of the Department in setting previous supervisory standards and, under the present act, the basis of presenting the proposal of the standard under such act. Mr. Victor B. Bonney, a Government witness, who is Chemist in Charge of the Canned Foods Section of the Food and Drug Administration, testified substantially as follows:

After being graduated in 1912 from Washington State College with the degree of Bachelor of Science in Chemistry, the witness served as an instructor in that institution, entering the Department of Agriculture in what was then the Bureau of Chemistry in 1914, working for six months in Washington, D. C., mostly taking training and doing work on analyses of foods and drugs. Early in 1915 he was transferred to the Denver station of the bureau and during the latter part of that year to the San Francisco station. His work was in general analyses of foods and drugs and while in San Francisco he worked mostly on fruits and vegetables, largely canned fruits and vegetables. In 1917 while still in the San Francisco station, he made a survey and put up experimental packs, in order to determine the methods used in canning tomatoes and the composition of the tomatoes used for canning. This experimental work on canned tomatoes was carried out continuously during the years 1918 and 1919. In 1919 he spent some time in Washington, D. C., learning the Howard mold count method of examining tomato products and their composition. He then visited tomato canneries in several eastern states and returned to California where he visited all tomato canneries in Southern California and a large number of those in Northern California during the packing season of 1919.

In 1920 he was transferred to the Seattle station of the Food and Drug Administration where he continued his work on fruits and vegetables, particularly canned fruits and vegetables. During his stay at that station he visited all tomato canneries in the States of Washington, Oregon and Northern Idaho.

In 1926 he was transferred to the Food Control Laboratory of the Food and Drug Administration at Washington. He was put in general charge of the work in

that laboratory on canned fruits and vegetables, and in the course of his official duties he examined the reports coming in from field laboratories on such products and tabulated and compiled data from such reports.

In 1930, he was appointed to his present position as Chemist in Charge of the Canned Foods Section of the Food and Drug Administration. Since then a great deal of his time has been devoted to work on standards of weight and fill of containers for various canned foods. In his present position he has also visited canneries and observed their methods of canning, particularly the method of canning tomatoes.

He has also made sample packs of canned tomatoes, analyzing such packs in the laboratory. In addition to this work, he supervised the work of the field stations and made tabulations of their inspections and analyses of various canned foods, including canned tomatoes.

In 1937, he visited tomato canneries in Utah and a number of canneries in California and again observed the entire processes of canning tomatoes. He has just recently tabulated the reports of analyses of 362 samples of canned tomatoes analyzed during the season of 1937 and 1938 by the laboratories of the Food and Drug Administration.

The witness then traced the history of the problem of canned tomatoes from the regulatory point of view of the Food and Drug Administration. He stated that aside from the general problem common to all foods of eliminating rot and decomposition, the chief regulatory problem which was encountered in connection with canned tomatoes was the problem of eliminating added water.

As early as 1912, the Board of Food and Drug Administration rendered a decision (F. I. D. 144), wherein it was asserted that "Some food products may be canned without the addition of any other substance whatsoever. For example, tomatoes, the addition of water in such instances being adulteration."

In 1917, the witness discovered in his work in California that tomato canneries were unintentionally adding water to canned tomatoes by the use of open steam coils or by live steam in some form; that this practice resulted in the dilution of the juices by the condensation of steam, and that after the Administration called this error in the method of canning to the attention of various companies concerned the practice was discontinued.

A second important regulatory problem relative to canned tomatoes arose in 1912 in connection with the practice of the canneries in some sections of the country by the adding of strained liquids which were prepared from trimmings and cores of whole, sound tomatoes, thus producing a product composed of whole tomatoes with strained liquid added.

In 1912 by the decision of the Board of Food and Drug Inspection (F. I. D. 144), the practice of adding pulp and liquid from trimmings to canned tomatoes in excess of the tomato juices present in the whole tomatoes was held to be an adulteration. The Board asserted "It has come to the notice of the Department that pulp prepared from trimmings, cores and other waste material is sometimes added to canned tomatoes. It is the opinion of the board that pulp is not a normal ingredient of canned tomatoes, and such an addition is adulteration. It is further the opinion of the board that the addition of tomato juice in excess of the amount present in the tomatoes used is adulteration, that is, if in the canning of a lot of tomatoes, more juice be added than is present in that lot, the same will be considered an adulteration."

However, the Bureau of Chemistry of the United States Department of Agriculture in 1914 asserted that there would be no objection to the sale of tomato puree made from trimmings under the label of "Tomatoes with Puree" provided that the statement that the product was made from trimmings was printed in a conspicuous manner. It was understood at that time that puree as used in connection with canned tomatoes implied a certain degree of concentration. In 1920, the Bureau of Chemistry again asserted that "properly ripened and prepared tomatoes packed in no more juice than normally comes from them after peeling and trimming may, without any qualification, be correctly labeled 'Canned Tomatoes'. This is the article which the purchaser expects to receive under the name 'Canned Tomatoes' and is the only article entitled to that name without qualifications.' "

By 1932, a standard for puree as an individual product having been promulgated, tomato puree, added to canned tomatoes and sold under the name, "Tomatoes with Straight Puree from Trimmings" was recognized as a different puree from the concentrated product sold by that name alone. From 1932, therefore, canned tomatoes with puree from trimmings have been sold under the name "Tomatoes with Straight Puree from Trimmings," and no particular concentration of such puree has been required.

In the service and regulatory announcement, F. D. 2, Revision 3, 1932 (R. p. 15—it should read F. I. D. 2, etc.), the difference in the two types of puree was clearly indicated. A footnote in that announcement asserted that "Tomato puree should not be confused with puree from trimmings, a term used in no other product commonly unconcentrated, sometimes added in the canning of tomatoes."

The witness testified that there had recently been conducted a survey in order to determine consumer understanding of the term "puree" as that word was used in connection with canned tomatoes; that the inspectors of the Food and Drug Administration contacted numerous consumers of canned tomatoes of four large cities, New York, Philadelphia, Chicago and Cincinnati. They were first asked their understanding of the term "tomato puree". If they had no knowledge or opinion they were not questioned further. If they did have some knowledge, they were asked what their understanding of the term "tomato puree from trimmings" was. These consumers included housewives, restaurant chefs, dietitians, home economists and restaurant purchasing agents. In addition some dealers in canned foods were also contacted. Altogether 206 persons were interviewed. Of these 183 considered "tomato puree" to be a concentrated article. The other 23 believed it to be a thick article. When shown the product labeled "tomatoes with puree from trimmings" 181 said they would expect the can to contain tomatoes with added tomato puree and that this added tomato puree would be a concentrated product. Twenty stated they would not expect such added puree to be a concentrated product. Five stated they were not familiar with the product so they had no idea what to expect. These interviews were embodied in official reports and the reports were present in the hearing room and identified and made available on cross-examination. The witness then detailed the processes by which canned tomatoes were made. From the evidence it would seem that there are three types of canned tomatoes.

(1) *First type—Canned tomatoes.* The most common of the three types of canned tomatoes is generally referred to simply as "tomatoes." In the packing process tomatoes are washed, sorted, trimmed, scalded, peeled, and cored. The order of these processes varies somewhat according to individual packer practice. When the liquid which drains from the tomatoes in the peeling and coring process is to be used in the finished product, sorting of the tomatoes is generally done before scalding. Tomatoes which are sorted out because of imperfections are trimmed by hand in such a manner as to remove imperfections. Following this scalding process, tomatoes are peeled and cored. If they have not been sorted and trimmed before scalding, the liquid, cores, and trimmings obtained at this point in the process are discarded. If, however, there has been sorting and trimming before scalding so that no unsound tomatoes are received by the peelers, the peels, cores, and liquid are kept for use in canning tomatoes or other tomato products. The peeled and cored tomatoes may be packed in containers either by hand or by a machine. To the tomatoes in their containers is added sufficient liquid which has drained from tomatoes in the peeling and coring process to fill the cans completely. The air in the tomatoes in their containers is then removed by heat or by a vacuum process and the container sealed.

Thereafter, the container is processed by heat, so as to prevent spoilage, and properly cooled, so as to prevent overcooking. (R., pp. 18 and 19.)

(2) *Second type—Solid pack.* In addition to the process of canning described above, some canners follow the practice of filling the container full of whole, sound, mature, red tomatoes, trimmed and cored as described in (1), without the addition of any liquid which may have drained from such tomatoes or from any other tomatoes. This type of canned tomatoes differs from the first type described only in that no additional tomato liquid is added. (R., p. 19.)

(3) *Third type—Tomatoes with puree from trimmings.* In this third method of canning tomatoes, whole tomatoes, trimmed, peeled, and cored as described in the first process, are placed in their containers so that their containers are about two-thirds to three-fourths full. To these partly filled containers is added a hot tomato liquid. This liquid is procured by placing the clean peels, cores, and liquid which has drained from tomatoes in the peeling and coring process into a machine known as a cyclone. To this tomato mixture may be added some whole tomatoes. The tomato mixture is then processed in the cyclone so as to strain the liquid and fleshy parts of the tomato from the skins, cores, and seeds. The resulting liquid is heated practically to boiling, but the heat is kept at such a point that there is no substantial concentration of the tomato material. The canned tomatoes, with the addition of this tomato material, have been sold under the name of "Tomatoes with Puree from Trimmings." (R., pp. 19 and 20.)

*"Tomatoes with puree from trimmings"—A misnomer.* The use of the term "tomatoes with puree from trimmings" to describe the third type of canned tomatoes is inaccurate, because the tomato material added to canned tomatoes is neither a puree, as that word is generally understood in connection with tomato products, nor is it prepared from trimmings. (R., p. 19.) The "puree" part of tomatoes with puree from trimmings is understood by consumers to be a concentrated product, and consumers expect to procure a concentrated product when they purchase the tomato product under the name of "Tomatoes with Puree from Trimmings." (R., p. 18.)

It would seem that the word "puree" means a concentrated product. It would likewise seem from the evidence that puree from trimmings is not a proper designation. Nevertheless, from both the aesthetic and economic standpoint consumers are entitled to know whether or not the added liquid to canned tomatoes is from whole tomatoes or those made from "by-products".

Therefore, the Presiding Officer suggests that an order be made and entered by the Secretary of Agriculture setting forth the detailed findings of fact hereinafter suggested as a part of such order and promulgating the regulation hereinafter set forth.

*Suggested Findings of Fact*

Tomatoes as used in canning must be of a red variety. (R., pp. 18, 35 and 58), and must be mature (R., p. 18).

(1) *First type—Canned tomatoes.* The most common of the three types of canned tomatoes is generally referred to simply as "tomatoes." In the packing process tomatoes are washed, sorted, trimmed, scalded, peeled, and cored. The order of these processes varies somewhat according to individual packer practice. When the liquid which drains from the tomatoes in the peeling and coring process is to be used in the finished product, sorting of the tomatoes is generally done before scalding. Tomatoes which are sorted out because of imperfections are trimmed by hand in such a manner as to remove imperfections. Following this scalding process, tomatoes are peeled and cored. If they have not been sorted and trimmed before scalding, the liquid, cores, and trimmings obtained at this point in the process are discarded. If, however, there has been sorting and trimming before scalding so that no unsound tomatoes are received by the peelers, the peels, cores, and liquid are kept for use in canning tomatoes or other tomato products. The peeled and cored tomatoes may be packed in containers either by hand or by a machine. To the tomatoes in their containers is added sufficient liquid which has drained from tomatoes in the peeling and coring process to fill the cans completely. The air in the tomatoes in their containers is then removed by heat or by a vacuum process and the container sealed. Thereafter, the container is processed by heat, so as to prevent spoilage, and properly cooled, so as to prevent overcooking. (R., pp. 18 and 19.)

(2) *Second type—Solid pack.* In addition to the process of canning described above, some canners follow the practice of filling the container full of whole, sound, mature, red tomatoes, trimmed and cored as described in (1), without the addition of any liquid which may have drained from such tomatoes or from any other tomatoes. This type of canned tomatoes differs from the first type described only in that no additional tomato liquid is added. (R., p. 19.)

(3) *Third type—Tomatoes with puree from trimmings.* In this third method of canning tomatoes, whole tomatoes, trimmed, peeled, and cored as described in the first process, are placed in their containers so that their containers are about two-thirds to three-fourths full. To these partly filled containers is added a hot tomato liquid. This liquid is procured by placing the clean peels, cores, and liquid which has drained from tomatoes in the peeling and coring process into a machine known as a cyclone. To this tomato mixture may be added some whole tomatoes. The tomato mixture is then processed in the cyclone so as to strain the liquid and fleshy parts of the tomato from the skins, cores, and seeds. The resulting liquid is heated practically to boiling, but the heat is kept at such a point that there is no substantial concentration of the tomato material. The canned tomatoes, with the addition of this tomato material, have been sold under the name of "Tomatoes with Puree from Trimmings." (R., pp. 19 and 20.)

*"Tomatoes with puree from trimmings"—A misnomer.* The use of the term "tomatoes with puree from trimmings" to describe the third type of canned tomatoes is inaccurate, because the tomato material added to canned tomatoes is neither a puree, as that word is generally understood in connection with tomato products, nor is it prepared from trimmings. (R., p. 19.) The "puree" part of tomatoes with puree from trimmings is understood by consumers to be a concentrated product, and consumers expect to procure a concentrated product when they purchase the tomato product under the name of "Tomatoes with Puree from Trimmings." (R., p. 18.)

*Labeling tomatoes with puree from trimmings.* Since tomato by-products in the form of tomato flesh and liquid obtained from skins, cores, and seeds cannot be accurately and truthfully described as tomatoes "with puree from trimmings," the product should be so labeled, so as truthfully to reveal the source of the raw-material ingredients. (R., pp. 25, 26, and 27.) Rot and decomposition attach first to the skins of the tomatoes and are concentrated, therefore, in a product made from skins, seeds, and cores. (R., p. 27.) Canned tomatoes made from whole tomatoes have generally been found to have a lower mold count than canned tomatoes prepared in part from liquid extracted from the skins of tomatoes. (R., p. 27.) The history of canned tomatoes with added material procured from skins, seeds, and cores reveals that this product has not merited the same degree of favor as tomatoes prepared from the whole fruit. (R., pp. 13, 14, 60, and 61.)

*Flavorings.* Zestful and harmless flavorings of any variety should be permitted to be used in the manufacture of canned tomatoes. (R., p. 23.) A label declaration declaring the presence of basil or other flavoring ingredients is necessary, in order to promote honesty and fair dealings in the interest of the consumer. (R., p. 23.) *Salt—Basil.* Salt and basil leaves are sometimes added to canned tomatoes.

*Suggested Conclusions in the Form of a Regulation*

*Canned Tomatoes—Identity; Label Statement of Optional Ingredients.* (a)

Canned tomatoes are mature tomatoes of red varieties, with any unsoundness removed by trimming, which are peeled and cored and to which may be added one or both of the following optional ingredients:

(1) The liquid draining from such tomatoes during or after peeling and coring.

(2) The liquid strained from tomato by-products (clean, sound peelings and cores from tomatoes of red varieties, with or without tomatoes or pieces of tomatoes of such varieties).

It may be seasoned with one or more of the optional ingredients:

(3) Salt.
(4) Spices.
(5) Flavoring.

It is sealed in a container and so processed by heat as to prevent spoilage.

(b) When optional ingredient (2) is present, the label shall bear the statement "Strained Tomato By-products Added." When optional ingredient (4) or (5) is present, the label shall bear the statement or statements "Spice Added" or "With Added Spice," "Flavoring Added" or "With Added Flavoring," as the case may be. If two or all of optional ingredients (2), (4), and (5) are present, such statements may be combined, as for example, "Strained Tomato By-Products, Spice, and Flavoring Added." In lieu of the word "Spice" or "Flavoring" in such statement or statements the common or usual name of such spice or flavoring may be used. Wherever the name "Tomatoes" appears on the label so conspicuously as to be easily seen under customary conditions of purchase, the statement or statements herein specified showing the optional ingredients present shall immediately and conspicuously precede or follow such name, without intervening written, printed, or graphic matter.

*Time Within Which to File Objections*

Within ten days after the receipt of the copy of the FEDERAL REGISTER containing this report, any interested person who wishes to object to any matter set out in the suggested findings of fact, conclusions, and order, shall transmit such objection in writing to the Hearing Clerk. At the same time each such interested person shall transmit in writing to the Hearing Clerk a brief statement concerning each of the objections taken to the action of the presiding officer upon which he wishes to rely, referring where relevant to the pages of the transcript of evidence.

Respectfully submitted.

[SEAL] JOHN MCDILL FOX,
*Presiding Officer.*

Date: April 6th, 1939.

[F. R. Doc. 39-1186; Filed, April 7, 1939; 2:27 p. m.]

## IN THE MATTER OF THE PUBLIC HEARING FOR THE PURPOSE OF RECEIVING EVIDENCE UPON THE BASIS OF WHICH REGULATIONS MAY BE PROMULGATED (A) FIXING AND ESTABLISHING DEFINITION AND STANDARD OF IDENTITY, STANDARD OF QUALITY, AND STANDARD OF FILL OF CONTAINER, FOR CANNED TOMATOES; AND (B) SPECIFYING FORM AND MANNER OF LABEL STATEMENTS FOR SUCH CANNED TOMATOES WHICH FALL BELOW SUCH STANDARD OF QUALITY, AND SUCH STANDARD OF FILL OF CONTAINER

## REPORT OF PRESIDING OFFICER, SUGGESTED FINDINGS OF FACT, CONCLUSION AND ORDER. IN RE: STANDARD OF QUALITY FOR CANNED TOMATOES

*General Statement*

1. In pursuance of the authority of subsection (e), Section 701 of the Federal Food, Drug, and Cosmetic Act [Sec. 701, 52 Stat. 1055; 21 U. S. C. 371 (e)], the Secretary of Agriculture, on his own initiative, published, on December 15, 1938 (which appeared on page 3009 of the FEDERAL REGISTER), a notice of a public hearing to be held on January 19, 1939, in Room 3036, Department of Agriculture, South Building, Independence Avenue, between 12th and 14th Streets, S. W., Washington, D. C., for the purpose of receiving evidence upon the basis of which regulations might be promulgated (a) fixing and establishing a definition and standard of identity, a standard of quality, and a standard of fill of container for canned tomatoes; and (b) regulations specifying the form and manner of label statements for canned tomatoes which fall below such standard of quality and such standard of fill of container. This notice contained a proposal in general terms for a reasonable definition and standard of quality, and standard of fill of container for canned tomatoes, and the form and manner of label statements for such food which falls below such standards of quality and fill of container, together with a provision for labeling of tomatoes which (1) fall below the standard of quality, and (2) fall below the standard of fill of container. The notice designated John McDill Fox as the presiding officer for said hearing. Thereafter, a public hearing was called at the time and place therein designated, and was adjourned to 2:45 p. m., on the same date, and said John McDill Fox served as presiding officer. (Government's Exhibit No. 1.)

2. At such hearing the Presiding Officer announced that he would first hold a hearing on identity and immediately subsequent he would hold hearings on quality, fill of container, and substandard labeling.

3. The said hearing on a proposed standard of quality was convened at 9:30 p. m., on January 19 and was concluded at 4:15 p. m., on January 20, 1939. All interested persons were notified, pursuant to the rules of procedure, of their opportunity to file proposed findings of fact and argument.

4. The Presiding Officer, therefore, makes this report and suggests that the Secretary make, on the basis of the substantial evidence contained in the record, the findings of fact herein contained, the conclusions herein suggested, and as so found, to order the promulgation of the regulation suggested herein with reference to a proposed standard of quality for the canned food product commonly known as tomatoes.

5. The proposal, as it appeared in the FEDERAL REGISTER on December 15, 1938, concerned itself, *inter alia*, with a proposed definition and standard of quality for the canned food product commonly known as tomatoes. It read as follows:

The food in the container meets the standard of quality when:

(a) The weight of tomatoes retained after draining for 2 minutes on an appropriate sieve, described below, equals or exceeds one-half the weight of water at 68° F. required to fill the container (such weight of water to be determined as specified in the accompanying method).

The sieve used shall have 2 meshes to the linear inch. The bottom shall be made of wire of a uniform diameter of 0.054" woven into square meshes with a uniform inside diameter of 0.446". For food in containers of less than 3 pounds net weight, such a sieve 8 inches in diameter shall be used. For food in containers of 3 pounds net weight or more, such a sieve 12 inches in diameter shall be used.

(b) The red color of the tomatoes is such that it complies with the following requirements: The pieces of tomatoes obtained in (a) are removed from the sieve and selected and cut in such manner as to successively segregate those portions in which the red color is least developed until they equal one-half of the total weight of the pieces of tomatoes obtained in (a). Such portions are reduced to a homogeneous mixture without removing or breaking the seeds. After freeing such mixture from air bubbles, a black container 1 inch deep is filled with the mixture and visible seeds are skimmed off or pressed below the surface. The color of the mixture in the black container is then compared in full daylight or its equivalent with a combination of the following blended Munsell color disks:

(1) 5R 2.6/13 (glossy finish).
(2) 2.5YR 5/12 (glossy finish).
(3) N 1/ (glossy finish).
(4) N 4 (mat finish).

If (1) the red color of the mixture is so well developed that it cannot be matched by any of these disks or any combination of them, or (2) if it is sufficiently devel-

oped to be matched by a combination in which the exposed area of disk (1) covers one-third or more of the circle, and the exposed area of disk (2) does not exceed that of (1) (regardless of the exposed area of disks (3) and (4)); the red color in either case meets the requirement of the standard.

(c) The tomatoes are so peeled that there is not more than ____ square inches (to be fixed at a point between 1 and 1.5 square inches) of peel per pound of net contents in the container.

(d) The fruit is so trimmed that the total of the maximum cross-sectional areas of all unsightly blemishes does not exceed ¼ square inch per pound of net contents in the container.

6. Within the time so provided, various interested persons filed proposed findings of fact, based upon the evidence adduced at the hearing, which if granted, would modify the proposal originally printed in the FEDERAL REGISTER. These proposed findings of fact concerned: (1) color, (2) blemishes, (3) amount of peel, and (4) drained weight.

7. There was some controversy in the evidence and in the proposed findings with reference to two matters: (1) the tolerance of peel and (2) the determination of the capacity of the container with reference to the standard for drained weight. With reference to this last matter, from the proposed findings of fact requested by other interested persons, it would seem that the standard for drained weight for tomatoes as given in Government's Exhibit No. 1, is in accordance with their contentions but that there is objection not so much to the specific method proposed by the Government to determine the capacity of the container but to having any method included in the standard.

8. The testimony described the history of the setting of quality standards for this food product and the basis for presenting the present proposals. Mr. Bonney, a Government witness, after qualifying himself as an expert with reference to his early training at Washington State College in 1912, detailed his experience with the Department. It appears that he entered the United States Bureau of Chemistry, now the Food and Drug Administration of the Department of Agriculture in 1914, from which time he has been continuously employed in various capacities. After a short training period in the analyses of foods and drugs he was transferred to Denver and then to San Francisco and thereafter to Seattle, Washington. He was at San Francisco during the period from 1915 to 1920; at Seattle during the period from 1920 to 1926. At San Francisco and Seattle he worked as an analyst, specializing in the analyses of fruits and vegetables, visiting canneries and fruit producing regions, and learning the methods of preparation and the commercial practices in connection with the canning of fruits and vegetables, especially tomatoes. He stated that he had visited all of the tomato canneries in California, many of them on numerous occasions, as well as those in Washington, northern Idaho and Oregon and observed the methods of preparation of fruits and vegetables for canning and the manufacturing practices employed, and since that time had kept abreast of the industry.

In 1926 he was transferred to Washington, D. C. From 1926 to 1930 he was in charge of the Food Control Laboratory work dealing with composition and analyses of fruits and vegetables, including canned tomatoes. Since 1930 he has been chemist in charge of the Canned Food Section of the Food and Drug Administration and has either himself visited practically all, if not all, of the tomato canneries in the United States observing canning practices, or received and read reports from his assistants with reference to such practices. The Canned Food Section is a section of the Food Division of the Food and Drug Administration. There is delegated to the witness as chemist in charge of the Canned Food Section matters pertaining to the identity, quality, composition and fill of container of canned foods coming within the scope of the act.

In 1930 an amendment to the Food and Drugs Act was past, permitting the Secretary of Agriculture to promulgate minimum standards of quality and fill of container for canned foods. It has been the duty of the witness to perform experimental work and to engage in studies leading to the preparation of such standards under this amendment. This is constantly being done by the witness together with the chemists engaged under him and also the devising of definite objective tests for determining such factors as were considered necessary. Among the canned foods that were thus studied were canned tomatoes. The witness or his assistants engaged in the preparation of authentic packs of canned foods of known origin and from the data thus obtained a recommendation as to a minimum standard of quality and fill of container was made. That data has been collected since 1917. Such data represented a consideration of tomatoes grown and canned in every tomato producing section of the United States. The witness likewise detailed the experience which he had had in grading canned foods, including canned tomatoes.

In 1930, under the McNary-Mapes Amendment to the Food and Drugs Act, he recommended the adoption of the minimum quality standard for canned tomatoes. This recommendation was based on a consideration of the factors involved. This was arrived at after conferences with canners, with the trade, with consumers, and with expert graders from all sections of the country. A quality standard was promulgated pursuant to the authority of this amendment by the Secretary of Agriculture in 1931. This standard embodied objective measurements and except for certain changes has been in force since that time. The proposed standard set forth in Government's Exhibit No. 1 is practically identical with the standard promulgated in 1931. Aside from the changes in form and wording, the two principal changes are as follows: First, that the amount of peel to be present in a standard can of tomatoes is to be fixed at a point between 1 and 1.5 square inches of peel per pound of net contents in the container in the proposed standard, while in the present standard the fruit is "peeled" where there are not more than 3 square inches of peel per pound of net contents in any one container and the average amount of peel per pound of net contents of the lot does not exceed 1 square inch; second, that the drained weight requirement is changed from a minimum of 50 percent of the contents of the can in the present standard to a requirement that the weight of tomatoes retained on an appropriate screen equals or exceeds one-half of the weight of water at 68° F. required to fill the container in the proposed standard, together with a method for determining the water capacity of the container.

The reasons for these changes were detailed previously as follows:

That in the last year and a half eight or nine thousand cans of tomatoes were examined and the results of the analyses of these samples showed that the changes were necessary in order to establish a fairer and more equitable standard and one which at the same time will preserve the interests of the canners who are adopting and establishing up-to-date methods and in the interests of the consumers by offering them a somewhat better quality of canned tomatoes than was afforded them under the old standard. The witness testified that the factors that were considered in determining quality were four, namely, drained weight, color, peel, and blemishes. The witness discussed at some length the reasons why these various factors were important, and in his testimony set forth that the methods which had previously been adopted were not found to be satisfactory. (R., pp. 14, 15.) Drained weight determinations had been made in the laboratory of the Food and Drug Administration during the period from July 1, 1937 to September 1, 1938, on 6,589 cans of tomatoes, and on 1,444 cans of tomatoes with so-called puree from trimmings. The tomatoes so examined were packed by 388 different packers located in 29 States of the United States and represented canned tomatoes from all the important tomato canning sections of the country, and all common sizes of con-

tainers. The average drained weight was 57 percent of the total contents of the can on canned tomatoes, and 50.7 percent of the total contents of the can on canned tomatoes with so-called puree from trimmings. During 1937 the Food and Drug Administration made determinations of drained weight of 1,000 cans of tomatoes at the canneries. These weights were made of 74 different lots. The average drained weight on all of these cans as specified as percent of total net contents of tomatoes was 65.1 percent. Drained tomatoes retained on a two-mesh sieve expressed as percent of water capacity of the containers was 63.4 percent. Examination was likewise made of about 500 cans of tomatoes of so-called puree from trimmings from canneries. The average drained weight of all these expressed as percent of total net weight was 54.6 percent. (R., pp. 14–16.) The average drained weight expressed as percent of the tomato meats retained on a two-mesh sieve compared with the water capacity of the containers was 52.5 percent. This would seem to indicate that the drained weight as expressed in the proposed standard will be approximately 2 percent lower than expressed in terms of percent of total net contents.

Summaries were prepared by the witness of the experiments conducted to determine only four of the factors and the records upon which such summaries were based were produced in the hearing room and made available for inspection and examination. The witness testified at some length with reference to the quality factors as a basis for the proposed standard with reference to the color factor. (R., pp. 18–23.) He not only definitely set forth the tests but described the experience and based his factual determination on an examination of 9,283 cans of tomatoes packed by 388 packers in 29 States during the period from July 1, 1937 to December 21, 1938. Inasmuch as there is no appreciable controversy with reference to this factor, the Presiding Officer does not feel that any detailed statement should be made of the evidence *in extenso*. There was, however, among all of the cans of tomatoes examined no canned tomatoes of the yellow variety found. (R., p. 22.) Similar testimony was adduced by the witness with reference to the proposed peel quality factor. The basis for the proposed change (R., p. 24) from that of the present standard would appear to be in conformity with the actual practice of canners and to be more in the interest of the consumers than the present standard. (R., p. 24.) From an examination of 5,849 cans of tomatoes and 875 cans of tomatoes with puree for peeled content it appeared that an average of 0.43 square inches per pound of net contents and an average of .087 square inches per pound of net contents for tomatoes with puree from trimmings was found. Of these 6,724 cans, 150 of the cans contained over 3 square inches peel per pound of net contents, 450 showed 1.5 to 3 square inches peel per pound of net contents, 303 showed a peel content of 1 to 1.5 square inches, and 5,555 showed over 1 square inch peel per pound of net contents. (R., pp. 24, 25.)

With reference to the proposed blemish factor, the same process was followed and 7,123 cans of tomatoes were examined for blemishes during the period from July 1, 1937 to September 1, 1938. The proposed standard does not change the requirement of the present standard with reference to blemishes and there seems to be no substantial evidence in the record contradicting the reasonableness of this standard.

In determining drained weight the witness testified substantially as follows:

That based upon his training and experience after hundreds of tests he determined that the appropriate sieve should be two-meshes to the linear inch. When the tomatoes were spread over this sieve and the sieve tilted as much as possible without the tomatoes sliding or rolling the liquid drained through such a sieve in slightly over two minutes. Circular sieves with this size mesh are standard equipment of manufacturers and the diameter of the wire used by the manufacturers to make such a sieve is 0.054 inch woven into square meshes such as to give a size of opening of 0.446 inch. The witness found from his experiments that the diameter of a sieve needs to be greater for the larger cans than for the smaller; that a sieve 8 inches in diameter is satisfactory for tomatoes in containers of less than 3 pounds net weight and for containers of 3 pounds net weight or more the diameter should be 12 inches to permit the proper draining of the liquid within the time specified.

The witness next testified with reference to the determination of the water capacity of the container. Containers for tomatoes may be of two types. The usual type is the ordinary sanitary tin can. The lid is attached to the can by means of a double seam. To determine the water capacity of this type of container, he cut out the top of the can with a can opener which does not injure the double seam. He then emptied, washed, dried, and weighed the empty can. Since his examination of a large number of containers showed the average depth of the double seam for ordinary sanitary cans to be 3/16 of an inch, he placed the empty can on a level surface and lay across the top of the double seam a depth gauge with pointed end set so that the end extends 3/16 of an inch below the top of the double seam. The gauge is so placed that the point is near the center of the opening. The can is then filled with water at 68° F. until the surface of the water just touches the point of the depth gauge. The depth gauge is then removed and the filled can weighed. This latter weight, minus the weight of the empty can, is for all practical purposes, the capacity of the can for water at 68° F.

In the other types of containers used for tomatoes, the lid is flush with the top, or very nearly so. The witness removes the lid, washed, dried, and weighed the container. He then fills the container to the top with distilled water at 68° F., weighs and subtracts the weight of the empty container. This figure gives, for all practical purposes, the weight of the distilled water the container will hold at 68° F.

The witness further described the Munsell color system which has been in use for seven or eight years and recommended its adoption. There seems to have been no substantial disagreement on this point. Evidence is further given by other interested persons and by a witness representing consumer organizations, which evidence is referred to in the suggested findings of fact.

Therefore, the presiding officer suggests that an order be made and entered by the Secretary of Agriculture setting forth the detailed findings of fact hereinafter suggested as a part of such order, and promulgating the regulation hereinafter set forth.

*Suggested Findings*

1. In 1931 under the McNary-Mapes Amendment to the Food and Drugs Act of 1906 (21 U. S. C. Sec. 10, Par. 5, in the case of food) the Secretary of Agriculture promulgated a reasonable standard of quality for canned tomatoes (R., pp. 8–11); such standard of quality included four factors that go to make up quality in canned tomatoes (R., p. 13); such quality factors are (1) the drained weight of the pieces of tomato in the can, (2) the color of the tomatoes, (3) the amount of peel and (4) tomato blemishes (R., p. 13); that objective measurements of such factors were included in such standard of quality (R., p. 11); such standard of quality for canned tomatoes has been in force since 1931 with minor changes (R., pp. 11–13); and such standard of quality was promulgated, including changes, for the purpose of promoting honesty and fair dealing in the interest of the consumer (R., p. 11).

2. A standard of quality for canned tomatoes based, as one of the factors to be considered, upon the weight of the tomatoes in the container that are retained, after proper draining for two minutes on a sieve (eight inches in diameter if the quantity of the contents of the container is less than three pounds and twelve inches in diameter if such quantity is three pounds or more) having two meshes to the linear inch and the bottom of which is made of wire of a uniform diameter of 0.054 inch, woven into square meshes of a uniform inside diameter of 0.446 inch, equalling or exceeding one-half of the weight of water at 68° F. required to fill the container, is a reasonable one

and would promote honesty and fair dealing in the interest of the consumers for the reasons that the sieve of the size described permits the liquid and very small pieces of tomato flesh to fall through the openings, retaining the larger tomato portions; one-half at least by volume of the can is tomato meats of sufficient size to serve the uses to which consumers make of the article; consumers can determine their needs and make budgetary allowances in purchasing the size can best suited to their needs knowing that not more than one-half is liquid and tomato fragments; and it can be precisely determined (R., pp. 13–16, 112–115, 156).

3. It is reasonable and will promote honesty and fair dealing in the interest of consumers to specify a drained weight requirement for canned tomatoes based on the water capacity of the container rather than a drained weight requirement based on the total contents in the container for the reason that the can, to the consumer's eye, is a measure of the quantity of drained tomato meats that ought to be received; recent examination of thousands of cans of tomatoes show that a requirement based on the water capacity of the container would be fairer and more equitable both to the canner and the consumer; it would give the consumer a better quality of tomatoes; it could be accurately determined; and it is in accord with good commercial canning practice (R., pp. 11–18, 37–39, 108–116, 156).

4. It is reasonable and it will promote honesty and fair dealing in the interest of consumers to prescribe, in a reasonable standard of quality for canned tomatoes, a method for determining the weight of water required to fill a metal container with lid attached by double seam which will include

(1) opening the container without injuring the double seam, removing contents, washing, drying and weighing the empty container,

(2) filling such container with distilled water of a temperature of 68° F. to three-sixteenths of an inch below the top level and then weighing the container and the water; and

(3) the result, after subtracting the weight of the empty container described in (1) from the weight of the container and water described in (2), is the weight of water required to fill the container, (R., pp. 28–30)

for the reason that the method is definite; that any method based on can dimensions would be approximate; that domestic and imported can construction differs; that calculations from dimentional measurements are not accurate; that three-sixteenths of an inch is the accepted and determined measure of the double seam; that the displacement method is not practicable or reasonable for a canner to use in his factory; and that the method here recommended is in accord with good commercial canning practice. (R., pp. 15, 16, 29, 30, 122, 125, 156.)

5. It is reasonable and will promote honesty and fair dealing in the interest of consumers to prescribe, in a reasonable standard of quality for canned tomatoes, a method of determining the weight of water required to fill containers other than those attached by double seam, which will include

(1) opening the container, removing contents, washing, drying and weighing the empty container,

(2) filling such container with distilled water of a temperature of 68° F. to the top and then weighing the container and the water; and

(3) the result, after subtracting the weight of the empty container described in (1) from the weight of the container and water described in (2), is the weight of water required to fill the container (R., pp. 28–30)

for the reasons that the method is definite; that any method based on can or container dimensions would be approximate; that domestic and imported container construction differs; that calculations from dimensional measurements are not accurate; that when tomatoes are in containers with lids other than those attached by means of a double seam the lid is placed on the top of the container; that the displacement method is only practicable with good commercial canning practice. (R., pp. 15, 16, 29, 30, 122, 125, 156.)

6. A standard of quality for canned tomatoes based, as one of the factors to be considered, upon the redness or height of the color of the tomatoes in the container

determined by taking and removing from the sieve the drained tomatoes obtained in determining the drained weight and cutting out and successively segregating those portions in which the red color is least developed until one-half by weight of such drained tomatoes have been so segregated; by reducing such segregated portions to a uniform mixture without removing or breaking the tomato seeds; by putting such mixture into a black container to a depth of at least one inch; by freezing such mixtures from air bubbles and skimming off or pressing below the surface all visible tomato seeds; by comparing the color of such mixture, in full diffused daylight or its equivalent, with the blended color of combinations of the following Munsell color discs, or the color equivalent of such discs:

Disc 1. Red—5R 2.6/13 (glossy finish)
Disc 2. Yellow—2.5 YR 5/12 (glossy finish)
Disc. 3. Black—N 1/ (glossy finish)
Disc 4. Grey—N 4/ (mat finish);

and if the redness or height of the color of such mixture is not less than that of any combination of the above-described Munsell color discs in which one-third of the area of disc 1 and not more than one-third of the area of disc 2 (regardless of the exposed area of discs 3 and 4) is exposed, then the color factor requirement is met, (R. pp. 18–23),

would be reasonable and would promote honesty and fair dealing in the interest of consumers in that the consumer would be assured of getting tomatoes with fairly well developed red color, and would be in accord with good commercial practice (R. pp. 20–21, 109–116).

7. In a standard of quality for canned tomatoes a maximum allowance of one square inch of tomato peel per pound of canned tomatoes in the container as one of the quality factors would be reasonable and would promote honesty and fair dealing in the interest of consumers in that, of the thousands of cans of tomatoes examined between July 1, 1937 and September 21, 1938 representing the output of 388 packers located in all of the principal tomato producing sections of the United States and being a very representative cross section of the industry, the great majority showed less than one inch of tomato peel per pound of canned tomatoes; the consumer expects to get a minimum amount of peel in a can of tomatoes; and it is in accord with good commercial practice (R. pp. 23–25, 109–116, 164–166)

8. In a standard of quality for canned tomatoes, a maximum allowance of one-fourth square inch of tomato blemish per pound of canned tomatoes in the container, as one of the quality factors, would be reasonable and would promote honesty and fair dealing in the interest of consumers for the reason that this quality factor has been in force since 1931 without change; of the thousands of cans of tomatoes examined for this factor but few failed to meet the requirement and the great majority was well below the tolerance; and it is in accord with good commercial practice and consumer understanding of the article (R. pp. 26–28, 109–116, 158)

9. There are no yellow varieties of tomatoes canned and sold under the name of tomatoes unqualified (R. pp. 22, 23, 148)

*Suggested Conclusions in the Form of a Regulation*

*Canned Tomatoes—Standard of Quality.* (a) The standard of quality for canned tomatoes is as follows:

(1) The drained weight, as determined by the method prescribed in subsection (b) (1), is not less than 50 percent of the weight of water required to fill the container, as determined by the following method for water capacity of containers.

(1) In the case of a container with lid attached by double seam, cut out the lid without removing or altering the height of the double seam.

(2) Wash, dry, and weigh the empty container.

(3) Fill the container with distilled water at 68° Fahrenheit to $\frac{3}{16}$ inch vertical distance below the top level of the container, and weigh the container thus filled.

(4) Subtract the weight found in (2) from the weight found in (3). The difference shall be considered to be the weight of water required to fill the container.

In the case of a container with lid attached otherwise than by double seam, remove the lid and proceed as directed in clauses (2) to (4) inclusive, except that under clause (3) fill the container to the level of the top thereof.

(2) the strength and redness of color, as determined by the method prescribed in subsection (b) (2), is not less than that of the blended color of any combination of the color discs described in such method, in which one-third the area of disc 1, and not more than one-third the area of disc 2, is exposed;

(3) peel, per pound of canned tomatoes in the container, covers an area of not more than 1 square inch; and

(4) blemishes, per pound of canned tomatoes in the container, cover an area of not more than one-fourth square inch.

(b) Canned tomatoes shall be tested by the following method to determine whether or not they meet the requirements of clauses (1) and (2) of subsection (a):

(1) Remove lid from container, but in the case of a container with lid attached by double seam, do not remove or alter the height of the double seam. Tilt the opened container so as to distribute the contents over the meshes of a circular sieve which has previously been weighed. The diameter of the sieve used is 8 inches if the quantity of the contents of the container is less than 3 pounds, or 12 inches if such quantity is 3 pounds or more. The meshes of such sieve are made by so weaving wire of 0.054 inch diameter as to form square openings 0.446 inch by 0.446 inch. Without shifting the tomatoes, so incline the sieve as to facilitate drainage of the liquid. Two minutes from the time drainage begins, weigh the sieve and drained tomatoes. The weight so found, less the weight of the sieve, shall be considered to be the drained weight.

(2) Remove from the sieve the drained tomatoes obtained in (1). Cut out and segregate successively those portions of least redness until 50 percent of the drained weight, as determined under (1), has been so segregated. Comminute the segregated portions to a uniform mixture without removing or breaking the seeds. Fill the mixture into a black container to a depth of at least 1 inch. Free the mixture from air bubbles, and skim off or press below the surface all visible seeds. Compare the color of the mixture, in full diffused daylight or its equivalent, with the blended color of combinations of the following concentric Munsell color discs of equal diameter, or the color equivalents of such discs:

1. Red—Munsell 5R 2.6/13 (glossy finish).
2. Yellow — Munsell 2.5 YR 5/12 (glossy finish).
3. Black—Munsell N 1/ (glossy finish).
4. Grey—Munsell N 4 (mat finish).

*Time Within Which to File Objections*

Within ten days after the receipt of the copy of the FEDERAL REGISTER containing this report, any interested person who wishes to object to any matter set out in the suggested findings of fact, conclusion, and order, shall transmit such objection in writing to the Hearing Clerk. At the same time such interested persons shall transmit in writing to the Hearing Clerk a brief statement concerning each of the objections taken to the action of the presiding officer upon which he wishes to reply referring where relevant to the pages of the transcript of evidence.

Respectfully submitted.

[SEAL] JOHN MCDILL FOX,
*Presiding Officer.*

Dated: April 8th, 1939.

[F. R. Doc. 39-1221; Filed, April 11, 1939; 12:36 p. m.]

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IN THE MATTER OF THE PUBLIC HEARING FOR THE PURPOSE OF RECEIVING EVIDENCE UPON THE BASIS OF WHICH REGULATIONS MAY BE PROMULGATED (A) FIXING AND ESTABLISHING DEFINITION AND STANDARD OF IDENTITY, STANDARD OF QUALITY, AND STANDARD OF FILL OF CONTAINER, FOR CANNED TOMATOES; AND (B) SPECIFYING FORM AND MANNER OF LABEL STATEMENTS FOR SUCH CANNED TOMATOES WHICH FALL BELOW SUCH STANDARD OF QUALITY, AND SUCH STANDARD OF FILL OF CONTAINER

REPORT OF PRESIDING OFFICER, SUGGESTED FINDINGS OF FACT, CONCLUSION AND ORDER. IN RE: LABELING OF SUBSTANDARD CANNED TOMATOES

*General Statement*

1. In pursuance of the authority of subsection (e), Section 701 of the Federal Food, Drug, and Cosmetic Act [Sec. 701, 52 Stat. 1055; 21 U. S. C. 371 (e)], the Secretary of Agriculture, on his own initiative, published, on December 15, 1938 (which appeared on page 3009 of the FEDERAL REGISTER), a notice of a public hearing to be held on January 19, 1939, in Room 3036, Department of Agriculture, South Building, Independence Avenue, between 12th and 14th Streets, S. W., Washington, D. C., for the purpose of receiving evidence upon the basis of which regulations might be promulgated (a) fixing and established a definition and standard of identity, a standard of quality, and a standard of fill of container for canned tomatoes; and (b) regulations specifying the form and manner of label statements for canned tomatoes which fall below such standard of quality and such standard of fill of container. This notice contained a proposal in general terms for a reasonable definition and standard of quality, and standard of fill of container for canned tomatoes, and the form and manner of label statements for such food which falls below such standards of quality and fill of container, together with a provision for labeling of tomatoes which (1) fall below the standard of quality, and (2) fall below the standard of fill of container. The notice designated John McDill Fox as the presiding officer for said hearing. Thereafter, a public hearing was called at the time and place therein designated, and was adjourned to 2:45 p. m., on the same date, and said John McDill Fox served as Presiding Officer. (Government's Exhibit No. 1.)

2. At such hearing the Presiding Officer announced that he would first hold a hearing on identity and immediately subsequent he would hold hearings on quality, fill of container, and substandard labeling.

3. The said hearing on a proposed labeling of substandard canned tomatoes was convened at 5:00 p. m., on January 20, 1939, and was concluded at 9:10 p. m. on the same day. All interested persons were notified, pursuant to the rules of procedure, of their opportunity to file proposed findings of fact and argument.

4. The Presiding Officer, therefore, makes this report and suggests that the Secretary make, on the basis of the substantial evidence contained in the record, the findings of fact herein contained, the conclusions herein suggested, and as so found, to order the promulgation of the regulation suggested herein with reference to a proposed labeling of substandard canned tomatoes.

5. The proposal, as it appeared in the FEDERAL REGISTER on December 15, 1938, concerned itself, *inter alia*, with a proposal with reference to the labeling of substandard canned tomatoes. It read as follows:

(1) *Tomatoes which fall below the standard of quality.*—An article of food which falls below the standard of quality shall be labeled in the following form and manner:

Wherever the name of the food or a picture thereof appears, there shall also appear immediately above or below such name or such picture, without intervening material and against a strongly contrasting uniform background, a box legend of the following specifications:

*Box.*—Rectangular in shape, with a border not less than 6 points in width.

*Wording enclosed in box.*—First line, "Substandard Quality," in 12-point Cheltenham bold condensed caps for containers of less than 1 pound of total contents, and in 14-point Cheltenham bold condensed caps for containers of 1 pound or more of total contents. Second line, "Good Food—Not High Grade," in 8-point Cheltenham bold condensed caps for containers of less than 1 pound of

total contents, and in 10-point Cheltenham bold condensed caps for containers of 1 pound or more of total contents.

(2) *Tomatoes which fall below the standard of fill of container.*—An article of food which falls below the standard of fill of container shall be labeled in the following form and manner:

For an article with total contents occupying an insufficient percentage of the total capacity of the container, the form and manner of labeling as to position, box and type shall be identical with that of (1). The wording of the first line in such box shall be "Substandard Fill" and the second line, "Excess Head Space."

*Provided,* That if the wordings specified in (1) and (2) are both applicable to a single article, they may be combined in a single box.

6. Within the time so provided, various interested persons filed proposed findings of fact, based upon the evidence adduced at the hearing, which if granted, would modify the proposal originally printed in the FEDERAL REGISTER. These proposed findings of fact concerned the wording which should be placed on tomatoes which under the act fall below either the standard of quality or the standard of fill of container of the product.

7. Testimony was given on behalf of Preston McKinney who testified substantially that the legend "below U. S. Standard" is objectionable. Mr. Shook (R. p. 34) suggested that the words "below standard" would be an improvement on "substandard." The wording "substandard" was regarded as being derogatory.

8. Therefore, the Presiding Officer suggests that an order be made and entered by the Secretary of Agriculture setting forth the detailed findings of fact as hereinafter suggested as part of such order, and promulgating the regulation hereinafter set forth.

*Suggested Findings of Fact*

1. That in 1931, under the McNary-Mapes Amendment to the Food and Drugs Act of 1906 (21 U. S. C. Sec. 10, Par. 5, in the case of food) to promote honesty and fair dealing in the interest of the consumer, the Secretary of Agriculture, after public hearings, promulgated a regulation providing for the labeling of canned foods that fell below the applicable standard of quality or fill of container, which included canned tomatoes (R. pp. 10–12); that such regulation required the label statement to indicate plainly that the product was substandard (R. p. 10); that the factors considered essential to indicate plainly that the product was substandard were (1) the relative prominence of the statement on the label; (2) such a position of the statement on the label with respect to the name or a pictorial representation of the product as would make the statement apparent or discernible under ordinary conditions of purchase and sale; (3) the kind and size of type used; and (4) a statement to be of such a nature that it would not convey a misleading impression (R. pp. 10–11); that such a regulation embodying these factors has been in force since 1931; and that essentially the same requirements are hereinafter recommended. (R. pp. 12, 30–32.)

2. That it would be reasonable and would promote honesty and fair dealing in the interest of consumers in promulgating a regulation providing for the labeling of canned tomatoes that fell *below* the applicable standards of quality or fill of container, to require such a label statement as would plainly indicate the product was substandard; that such a label statement would include prominence, position, display, type, clarity and certainty; and that such a label statement would indicate clearly and concisely that the article failed to meet the standards of quality or fill of container applicable thereto. (R. pp. 10–27, 30–32.)

3. That such a label statement would plainly indicate that the product was below standard if it appeared in connection with the product name and/or pictorial representation thereof so as to be clearly visible under ordinary conditions of purchase and sale (R. pp. 13–15).

4. That it would be reasonable and would promote honesty and fair dealing in the interest of consumers to require, on substandard quality canned tomatoes, the statement "Below Standard Quality" on one line and "Good Food—Not High Grade" on a line below; to be printed in type of 12-point Cheltenham bold condensed caps for the first line and for the second line 8-point type of the same style if the quantity of the contents of the container is less than one pound, and if such quantity is one pound or more in type of the same style, the first line to be 14-point, and the second line 10-point; such statement to be enclosed within a border, not less than 6 points in width, in the shape of a rectangle; and such statement, so enclosed, to be on a strongly contrasting, uniform background, so placed as to be clearly seen when the word "Tomatoes" or any pictorial representation of a tomato is viewed, wherever such word or representation appears so conspicuously as to be easily seen under customary conditions of purchase and sale. (R. pp. 10–27, 30–33.)

5. That it would be reasonable and would promote honesty and fair dealing in the interest of consumers to require, on below standard fill of container canned tomatoes, the statement "Below Standard Fill" to be printed in type of 12-point Cheltenham bold condensed caps for the first line and for the second line 8-point type of the same style if the quantity of the contents of the container is less than one pound, and if such quantity is one pound or more in type of the same style, the first line to be 14-point and the second line 10-point; such statement to be enclosed within a border, not less than 6 points in width, in the shape of a rectangle; and such statement, so enclosed, to be on a strongly contrasting, uniform background, so placed as to be clearly seen when the word "Tomatoes" or any pictorial representation of a tomato is viewed, wherever such word or representation appears so conspicuously as to be easily seen under customary conditions of purchase and sale (R. pp. 10–27, 30–33, 36).

6. That it would be reasonable and would promote honesty and fair dealing in the interest of consumers to require, on canned tomatoes that fall below both the standard of quality and the standard of fill of container applicable thereto, both the statements described in paragraphs 4 and 5, the one following the other, and enclosed in a single rectangle. (R. pp. 10–27, 30–34.)

7. That the statement "Below U. S. Standard" on below standard quality or fill of container canned tomatoes is indefinite (R. pp. 22, 30–33); is misleading (R. pp. 16, 17, 23, 30–33); and conveys the impression to the consumer that the United States Government supervised the preparation of the article. (R. pp. 16, 17, 22, 23, 30–33, 34.)

8. That the statement "slack fill" on substandard quality or fill of container canned tomatoes is ambiguous (R. pp. 23, 24, 30–33, 36, 37); is indefinite (R. pp. 25, 30–33, 36); and the meaning that is intended to be conveyed to the consumer by the words "slack fill" is uncertain. (R. pp. 24, 25, 30–33, 36, 37.)

*Conclusions in the Form of a Suggested Regulation Prescribing the Label Statements for Canned Tomatoes Falling Below the Standard of Quality; the Standard of Fill of Container or Both Applicable Thereto*

From the foregoing Suggested Findings of Fact, the following suggested reasonable regulation prescribing the label statements for canned tomatoes falling below the standard of quality and/or the standard of fill of container applicable thereto, is recommended:

(a) When Canned Tomatoes Fall Below the Standard of Quality Therefor:

The term "Substandard Quality" means the statement "Below Standard Quality Good Food—Not High Grade" printed in two lines of Cheltenham bold condensed caps. The words "Below Standard Quality" constitute the first line, and the second immediately follows. If the quantity of the contents of the container is less than one pound, the type of the first line is 12-point, the second, 8-point. If such quantity is one pound or more, the type of the first line is 14-point, and of the second, 10-point. Such statement is enclosed within lines

not less than 6 points in width, forming a rectangle. Such statement is within enclosing lines, is on a strongly contrasting, uniform background, and is so placed as to be easily seen when the name of the food or any pictorial representation is viewed, wherever such name or representation as appears as to be conspicuously and easily seen under customary conditions of purchase.

(b) If the Quality of Canned Tomatoes Falls Below the Standard—

If the quality of canned tomatoes falls below the standard hereinbefore prescribed, the label shall bear the statement of "Below Standard Quality" specified but, in lieu of such statement, the label may bear the alternative statement "Below Standard in Quality ____," the blank to be filled in with the words specified with reference to which such canned tomatoes fails to meet the requirements as follows: (1) "Excessively Broken Up"; (2) "Poor Color"; (3) "Excessive Peel"; (4) "Excessive Blemishes." If such canned tomatoes fail to meet both of these conditions, the words "Excessive Peel and Blemishes" may be used instead of the words hereinbefore denoted. Such alternative statement shall immediately and conspicuously precede or follow, without intervening written, printed, or graphic matter, the name "Tomatoes" and any statements required or authorized to appear with such name.

(c) When Canned Tomatoes Fall Below the Standard of Fill of Container Applicable Thereto—

The term "substandard fill" means the statement "Below Standard in Fill" printed in Cheltenham bold condensed caps. If the quantity of the contents of the container is less than one pound, the statement is in 12-point type; if such quantity is one pound or more, the statement is in 14-point type. Such statement is enclosed within the lines, not less than 6 points in width, forming a rectangle; but if the statement "Below Standard Quality" is also used, both statements (one following the other) may be enclosed within the same rectangle. Such statement or statements, with enclosing lines, are on a strongly contrasting, uniform background, and are so placed as to be easily seen when the name of the food or any pictorial representation thereof is viewed, wherever such name or representation appears so conspicuously as to be easily seen under customary conditions of purchase.

*Time Within Which to File Objections*

Within ten days after the receipt of the copy of the FEDERAL REGISTER containing this report, any interested person who wishes to object to any matter set out in the suggested findings of fact, conclusion, and order, shall transmit such objection in writing to the Hearing Clerk. At the same time such interested persons shall transmit in writing to the Hearing Clerk a brief statement concerning each of the objections taken to the action of the Presiding Officer upon which he wishes to reply, referring where relevant to the pages of the transcript of evidence.

Respectfully submitted.

[SEAL] JOHN MCDILL FOX,
*Presiding Officer.*

Dated: April 8th, 1939.

[F. R. Doc. 39–1219; Filed, April 11, 1939; 12:35 p. m.]

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IN THE MATTER OF THE PUBLIC HEARING FOR THE PURPOSE OF RECEIVING EVIDENCE UPON THE BASIS OF WHICH REGULATIONS MAY BE PROMULGATED (A) FIXING AND ESTABLISHING DEFINITION AND STANDARD OF IDENTITY, STANDARD OF QUALITY, AND STANDARD OF FILL OF CONTAINER, FOR CANNED TOMATOES; AND (B) SPECIFYING FORM AND MANNER OF LABEL STATEMENTS FOR SUCH CANNED TOMATOES WHICH FALL BELOW SUCH STANDARD OF QUALITY, AND SUCH STANDARD OF FILL OF CONTAINER

REPORT OF PRESIDING OFFICER, SUGGESTED FINDINGS OF FACT, CONCLUSION AND ORDER. IN RE: STANDARD OF FILL OF CONTAINER FOR CANNED TOMATOES

*General Statement*

1. In pursuance of the authority of subsection (e), Section 701 of the Federal Food, Drug, and Cosmetic Act [Sec. 701, 52 Stat. 1055; 21 U. S. C. 371 (e)], the Secretary of Agriculture, on his own initiative, published, on December 15, 1938 (which appeared on page 3009 of the FEDERAL REGISTER), a notice of a public hearing to be held on January 19, 1939, in Room 3036, Department of Agriculture, South Building, Independence Avenue, between 12th and 14th Streets, S. W., Washington, D. C., for the purpose of receiving evidence upon the basis of which regulations might be promulgated (a) fixing and establishing a definition and standard of identity, a standard of quality, and a standard of fill of container for canned tomatoes; and (b) regulations specifying the form and manner of label statements for canned tomatoes which fall below such standard of quality and such standard of fill of container. This notice contained a proposal in general terms for a reasonable definition and standard of quality, and standard of fill of container for canned tomatoes, and the form and manner of label statements for such food which falls below such standards of quality and fill of container, together with a provision for labeling of tomatoes which (1) fall below the standard of quality, and (2) fall below the standard of fill of container. The notice designated John McDill Fox as the presiding officer for said hearing. Thereafter, a public hearing was called at the time and place therein designated, to wit, January 19, 1939, at 10 a. m., in Room 3036. Said hearing was, from time to time, continued and was concluded at 9:10 p. m., of January 20, 1939.

2. At such hearing the Presiding Officer announced that he would first hold a hearing on identity and immediately subsequent he would hold hearings on quality, fill of container, and substandard labeling.

3. At 2 p. m., on January 19, 1939, the hearing on a proposed standard for fill of container for the food product commonly known as tomatoes was convened and at 2:45 p. m. on that day was adjourned until 4:20 p. m., on January 20, 1939 and concluded at 5:50 p. m. of the same day. All interested persons were notified, pursuant to the rules of procedure, of their opportunity to file proposed findings of fact and argument.

4. The Presiding Officer, therefore, makes this report and suggests that the Secretary make, on the basis of the substantial evidence contained in the record, the findings of fact herein contained, the conclusions herein suggested, and as so found, to order the promulgation of the regulation suggested herein with reference to a proposed standard for fill of container for the canned food product commonly known as tomatoes.

5. The proposal, as it appeared in the FEDERAL REGISTER on December 15, 1938, concerned itself, *inter alia*, with a proposed definition and standard for fill of container for the canned food product commonly known as tomatoes. It read as follows:

(1) *For cylindrical metal containers.* (a) Percent of total capacity of container occupied by total contents:

Measure carefully to the nearest sixteenth of an inch the following, expressing as a whole number the total number of sixteenth inches:

*A*, the over-all height of the container;

*B*, the combined heights of the double seams of the closed container (sum of the vertical distances, taken at each end, from the top of the double seam to the point where the cover turns at right angles to the side wall);

*C*, the vertical distance from the top of the double seam to the highest point of the product (after carefully opening the container without disturbing the double seam).

Obtain the percent of total capacity of container occupied by total contents by the following formula:

$$\frac{A-\frac{(C-B)}{2}}{A-B}\times 100$$

where *A*, *B*, and *C* are the measurements, expressed and designated as in (1) (a) above.

(b) Weight of water at 68° F. required to fill the container:

Measure over-all diameter of container at the highest point of the side to the nearest sixteenth of an inch (for use in Table A). Multiply measurement *A* minus measurement *B*, obtained and expressed as in (1) (a), by the avoirdupois ounces of water at 68° F. correspond-

ing to each sixteenth inch of height of a container of the outside diameter above determined, such weight of water being obtained from Table A. The product of the above multiplication is deemed to be the weight of water at 68° F. required to fill the container.

TABLE A

| Outside diameter at lid, in sixteenth inches: | *Avoirdupois Ounces Water at 68° F. per Each Sixteenth Inch Height* |
|---|---|
| 34 | 0.120 |
| 40 | .162 |
| 43 | .188 |
| 45 | .205 |
| 48 | .234 |
| 49 | .241 |
| 51 | .264 |
| 55 | .306 |
| 60 | .371 |
| 65 | .431 |
| 68 | .487 |
| 82 | .704 |
| 99 | 1.033 |
| 106 | 1.194 |

For containers with diameters not given in Table A, determine water capacity as described in (2) (b).

(2) *For square, or other non-cylindrical metal containers with vertical sides.* (a) Percent of total capacity of container occupied by total contents:

Determine as in (1) (a). If a determination of water capacity is also necessary, open container as described in (2) (b).

(b) Weight of water at 68° F. required to fill the container:

With a hack saw make a level cut across the top of the container in such a manner as to just divide the lid into two approximately equal parts. Cut out one of such parts with a can opener. Remove contents and close, with adhesive tape or other convenient material, any saw cuts in the sides which extend below the level of the lid. Rinse container with water, dry, and weigh. Fill container with distilled water at 68° F. to the point where the lower surface of the lid meets the sides. Weigh again. The difference in weight is deemed to be the weight of water at 68° F. required to fill the container.

(3) *For metal containers with sloping sides, or otherwise irregular in shape.* (a) Weight of water at 68° F. required to fill the container:

After cutting and removing part of lid as described in (2) (b), measure distance from the highest point of the side of container to the highest point of the product (for use in (3) (b)). Determine water capacity as described in (2) (b).

(b) Percent of total capacity of container occupied by total contents:

Draw off water used in determining water capacity under (3) (a) until the container is filled to the same point as that formerly occupied by the product. Determine the weight of water remaining and divide it by the water capacity as determined in (3) (a). The quotient multiplied by 100 gives the percent of total capacity of container occupied by total contents.

(4) *For glass or other non-metallic containers.* (a) Weight of water at 68° F. required to fill the container:

Remove closure (lid or cap) and measure to the nearest sixteenth of an inch the distance from the highest point of the container to highest point of the product (for use in (4) (b)). After removing product, rinse, dry, and weigh container. Fill container completely with distilled water at 68° F. Weigh again. The difference in weight is deemed to be the weight of water at 68° F. required to fill the container.

(b) Percent of total capacity of container occupied by total contents:

Determine as described in (3) (b).

Tomatoes—Proposed Standard of Fill of Container for the Canned Food Product Commonly Known as Tomatoes

The food in the container meets the standard of fill when the total contents so fill the container that they occupy at least ____ percent (to be fixed at a point between 90 and 95 percent) of the total capacity of such container (such percentage to be determined as specified in the accompanying method).

6. Within the time so provided, various interested persons filed proposed findings of fact, based upon the evidence adduced at the hearing, which if granted, would modify the proposal originally printed in the FEDERAL REGISTER. These proposed findings of fact concerned:

(1) What percentage of the container shall be occupied by canned tomatoes; (2) How shall such percentage be determined; (3) should any method be prescribed.

7. There was controversy in the evidence with reference to all of these matters.

8. The testimony described in detail the various efforts on the part of the Department, on the part of the canning industry, to set certain standards and certain methods. Mr. Victor B. Bonney, a Government witness, after having first qualified himself by training and experience, testified as follows:

That he was graduated from the Washington State College in 1912, with the degree of Bachelor of Science in Chemistry. The following year he was an instructor in chemistry in that school. In 1914, he joined the Department of Agriculture with the then United States Bureau of Chemistry which is now the Food and Drug Administration, from which time until the present, he has been employed constantly with the Department of Agriculture. That he was at San Francisco from 1915 to 1920; in Seattle, from 1920 to 1926; in 1926, he was transferred to Washington, D. C., and after 1930, was in charge of the Food Control Laboratory work dealing with the composition and analysis of fruits and vegetables including canned tomatoes; that since 1930, he was chemist in charge of the canned food section of the Food and Drug Administration. That part of his duties have to do with matters pertaining to the identity, quality, composition and fill of container of canned foods coming within the scope of the Foods and Drugs Act. That in this hearing, there was physically incorporated his qualifications, duties, and experience, as testified in various other hearings. That his experience with the problems relative to the fill of container of canned foods began in 1917; that after the passage of the McNary-Mapes amendment to the Federal Food and Drug Act of 1930, he began work on the problem of fill of container for various foods, including canned tomatoes, from the viewpoint of head-space in the container. During that time, he supervised the examination of head-space measurements in tens of thousands of cans of canned tomatoes. Since the enactment of the present Food, Drug, and Cosmetic Act, and during the past few months previous to the hearing, he had been working upon the problem of formulating a reasonable and practical method for the determination of fill of container for canned tomatoes. In connection with this study, he had examined the official reports made by the Food Chemists, the Food and Drug Administration, covering approximately the time between July 1937 and September 1938, of about 10,000 samples of canned tomatoes. These samples were procured from various sections of the country and examined for the purpose of determining the exact amount of fill which each sample contained. 561 cans of these 10,000 were taken at random, representing products packed in all sections of the United States. Of these 561 cans, 25 showed less than 85 percent of the total capacity occupied by the contents; 53 showed between 85 and 89.9 percent; 50, between 90 and 92.4 percent; 81, between 92.5 and 93.9 percent; 75, between 94 and 94.9 percent; 181, between 95 and 97.4 percent; 96, between 97.5 and 100 percent. The average percent of the capacity occupied by the contents for all 561 cans was 93.9 percent. Two jars, glass packed, were examined and showed respectively 93.9 percent and 94 percent. In addition to his own work in the examination of canned tomatoes to determine the amount of fill in individual cans, he had taken the report of the Conference Committee of Distributors, Brokers and Canners Association published by the National Canners Association on the weights and various sizes of cans of tomatoes should contain according to the opinion of that committee. He translated those various weights into figures showing the fill of cans which would be found, determined by the method he was using on cans of sizes specified, filled to the net weight recom-

mended for label declaration. This entire opinion of his was purely theoretical. He gave as his opinion the fair and reasonable standard of the fill of container for canned tomatoes would require a fill of at least 92 percent and the capacity of the container to be measured by the method that he used. The Conference Committee sent out minimums of percentage of fill at 90 percent, whereas the study showed that the average fill is at present about 94 percent. The method that he employed in measuring the capacity of containers for the determination of the amount of tomatoes is as follows: (R., pp. 34–37.)

Containers may be of two types: the usual type is the ordinary sanitary tin container; the lid is attached to the can by the means of a double seam. For that type of container, the witness first cut out the top of the can with the can opener which did not injure the double seam, and then emptied, washed, dried and weighed the can. He then filled the container with water at room temperature, to three-sixteenths of an inch below the vertical distance below the top of the double seam, and weighed the container thus filled. The latter weight is, for all practical purposes, the capacity of the can for water. In determining the percentage of the capacity that the container occupied by the food, he cut out the top of the can, as previously described, but before emptying, he determined, by means of a depth gauge, the distance from the top of the product to the top of the double seam. After determining the water capacity of the container as described, the depth gauge was then inserted to a point reached by the top of the product. The water in the can was then drawn off until the surface of the water just touched the water of the depth gauge, and the can and the water then removed were weighed. The weight of the can was then subtracted to get the weight of the water remaining in the can. This figure, the witness testified, multiplied by 100 and divided by the water capacity of the can, will give the percentage of the volume of the container occupied by the food product. In determining the water capacity of containers of other types, the witness testified that the lid was flush with the top or very nearly so; that he removed the lid, and after measuring with the depth gauge the distance from the top of the container to the highest level of the food product, he emptied, washed, dried, and weighed the food container. He then filled the container to the top with water at room temperature, he weighed and subtracted the weight of the empty container. This figure, he testified, was the weight of water the container will hold. With reference to the method of determining the percentage of the capacity of the container occupied by the tomato product, the witness testified as follows:

He inserted the depth gauge to the point which was reached by the food product, drawing off the water in the container until the surface of the water barely touched the depth gauge. The container and water remaining were then weighed. The weight of the container was then subtracted to get the weight of the water remaining in the can. That figure, multiplied by 100 and divided by the water capacity of the can, the witness testified, gave the percentage of the volume of the container occupied by the product. The witness testified that it would be necessary to make an allowance for the average depth of the double seam in the sanitary tin cans, of three-sixteenths of an inch. There was other testimony by the witness based upon other standards.

The witness further testified that certain forms of containers are deceptive; that various methods of measuring are reasonably good in practice but there should be a definite method prescribed which would follow out the standard. (R., p. 39.)

Dr. F. F. Fitzgerald, another interested party, presented very definite testimony against the proposed standards. In essence, he suggested that while the proposed Government method apparently allows for but two-sixteenths of an inch per end, that the industry has found three-sixteenths of an inch more exact, and uses it. He gave substantial evidence to support his contention. (R., p. 13.) He suggests that in order to meet a definite standard, canners must attempt a higher point (R., p. 15); that in his opinion, and he was a qualified expert, that where the minimum fill is put at 90 percent, one is getting into danger because of the difficulty in commercial practice of hitting an exact figure. Government's witness, Mr. Bonney (R., p. 34), refers to the present minimum of 90 percent. He states that his study, which is theoretical, would tend to have him believe that a higher standard would reasonably be required.

The witness, Shook (R., p. 41), again asks the Government witness what the basis for his recommendation for the increase from 90 to 92 percent is. The witness does not seem to validate his opinion. It would seem from all the evidence that cans can be conveniently filled more than 90 percent, but that in commercial practice, due to various factors, canners attempt, in reaching a minimum, to fill more than the minimum required.

Therefore, the presiding officer suggests that an order be made and entered by the Secretary of Agriculture setting forth the detailed findings of fact hereinafter suggested as part of such order, and promulgating the regulation hereinafter set forth:

*Suggested Findings*

1. *Types of containers.* Containers for tomatoes may be of two types: (1) the usual "sanitary" tin can (R., p. 34) and (2) glass and all other kinds of containers other than the ordinary "sanitary" tin can (R., p. 36).

2. *Method of measuring capacity of fill for all containers.* A. The fill of container for tin cans with lids of a double seam shall be determined by the following method:

(1) Cut out the lid without removing or altering the height of the double seam.

(2) Measure the vertical distance from the top level of the container to the top level of the food by means of a depth gage.

(3) Remove the food from the container; then wash, dry, and weigh the container.

(4) Fill the container with water which is at room temperature to three-sixteenths of an inch vertical distance from the top level of the container. Then weigh the container thus filled and determine the weight of the water by subtracting the weight of the container found as prescribed in (3).

(5) Draw off enough water from the container so that the level of the water corresponds to the level of the food as found in the measurement (2) above. Weigh the container with the remaining water and determine the weight of such remaining water by subtracting the weight of the container as determined by method (3) above.

(6) Divide the weight of water found by method (5) above by the weight of water found by method (4) above, and multiply by 100. The result should be the percentage of the total capacity of the container occupied by the food.

B. The fill of container for glass or other types of container, other than described in "A" above, shall be determined in the same method as outlined above, except that process (1) is omitted and in lieu of process (4) the container is filled with water so that the water is level with the top of such container. (R., pp. 34–37, 55.)

3. *A practical method.* The method of measuring the fill of container as presented in suggested finding number 2 (a) is reasonably accurate. The method as applied to tin cans with a double seam does not reach mathematical exactness, however, because an allowance of three-sixteenths of an inch is made for the height of such seams, whereas such seams may not be exactly three-sixteenths of an inch. Such variations from the allowance as may exist are, however, of no particular consequence as affecting either the consumer or the producer. (R., p. 37.)

4. *Necessity for a standard.* A standard of fill of container based upon the suggested finding 2 is a necessity, in order to promote honesty and fair dealings in the interest of the consumer by insuring him a container which is practically full. (R., pp. 35, 38, 56, 57.)

5. *Good commercial practice.* Under good commercial practice, a standard fill of container based upon the preceding suggested findings could be easily met by good commercial practice. (R., p. 38.)

6. *Profile ends.* In addition to the space in the can as measured to the bottom of the lid, there are seams in each end of the can which allow some additional space in such containers. R., pp. 50, 51.)

7. *Head-space measurement.* The method of measuring head-space in order to determine the percentage of the container occupied by the food is not an accurate index to the proportion of the food to the space in the container. This is true because many containers for canned tomatoes are not cylindrical and only perfect cylinders can be measured accurately by the head-space method. Even the ordinary tin can in general commercial use is not a perfect cylinder, and the measuring of head-space is accurate for determining the proportion of the capacity of the container occupied by food only in the case of containers having a uniform cross-section area throughout the entire height. (R., p. 56.)

8. *Irregular container—head-space.* Irregular containers now in use for canned tomatoes cannot be effectively be measured by the head-piece method. (R., p. 56.)

9. *A simple and practical method.* The methods for measuring fill of container for canned tomatoes, set out in suggested finding number 2, are simple and practical, and lend themselves most admirably to commercial practice. (R., pp. 55, 56.)

10. That the standard practice of conners which has received consumer acceptance is that the fill of container of canned tomatoes is a fill of not less than 90 percent of the total capacity of the container.

*Suggested Conclusion in the Form of a Regulation*

Upon the basis of the foregoing suggested findings of fact, the following reasonable definition and standard of identity for fill of container for canned tomatoes is hereby suggested to be promulgated as a regulation:

*Canned Tomatoes—Fill of Container.* (a) The standard of fill of container for canned tomatoes is a fill of not less than 90 percent of the total capacity of the container, as determined as follows:

(1) In the case of a container with lid attached by double seam, cut out the lid without removing or altering the height of the double seam.

(2) Measure the vertical distance from the top level of the container to the top level of the food.

(3) Remove the food from the container; wash, dry, and weigh the container.

(4) Fill the container with water to three-sixteenths of an inch vertical distance below the top level of the container. Record the temperature of the water, weigh the container thus filled, and determine the weight of the water by subtracting the weight of the container found in (3).

(5) Maintaining the water at the temperature recorded in (4), draw off water from the container as filled in (4) to the level of the food found in (2), weigh the container with remaining water, and determine the weight of the remaining water by subtracting the weight of the container found in (3).

(6) Divide the weight of water found in (5) by the weight of water found in (4), and multiply by 100. The result shall be considered to be the percent of the total capacity of the container occupied by the food.

In the case of a container with lid attached otherwise than by double seam, remove the lid and proceed as directed in clauses (2) to (6) inclusive, except that under clause (4), fill the container to the level of the top thereof.

*Time Within Which to File Objections*

Within ten days after the receipt of the copy of the FEDERAL REGISTER containing this report, any interested person who wishes to object to any matter set out in the suggested findings of fact, conclusion, and order, shall transmit such objection in writing to the Hearing Clerk. At the same time each such interested person shall transmit in writing to the Hearing Clerk a brief statement concerning each of the objections taken to the action of the presiding officer upon which he wishes to rely, referring where relevant to the pages of the transcript of evidence.

Respectfully submitted.

[SEAL] JOHN MCDILL FOX,
*Presiding Officer.*

Date: April 8th, 1939.

[F. R. Doc. 39-1220; Filed, April 11, 1939; 12:35 p. m.]

## CIVIL AERONAUTICS AUTHORITY.

[Docket No. 215]

IN THE MATTER OF AN AGREEMENT, C. A. A. No. 102, BETWEEN UNITED AIR LINES TRANSPORT CORPORATION AND WESTERN AIR EXPRESS CORPORATION RELATING TO THE INTERCHANGE OF SLEEPER AIRPLANES AT SALT LAKE CITY, UTAH

NOTICE OF HEARING

APRIL 10, 1939.

The above-entitled proceeding is assigned for public hearing on May 1, 1939, at 10 o'clock a. m. (Eastern Standard Time) at the Carlton Hotel, 923 16th Street NW., Washington, D. C., before Examiner F. W. Brown.

By the Authority.

[SEAL] PAUL J. FRIZZELL,
*Secretary.*

[F. R. Doc. 39-1213; Filed, April 11, 1939; 11:23 a. m.]

## SECURITIES AND EXCHANGE COMMISSION.

*United States of America—Before the Securities and Exchange Commission*

At a regular session of the Securities and Exchange Commission, held at its office in the City of Washington, D. C. on the 31st day of March, A. D. 1939.

[File No. 43-190]

IN THE MATTER OF COLORADO CENTRAL POWER COMPANY

ORDER

Colorado Central Power Company, a subsidiary of Crescent Public Service Company, a registered holding company, having filed a declaration pursuant to Section 7 of the Public Utility Holding Company Act of 1935 regarding the issue and sale of First Mortgage 4¼% Bonds, Series A, due May 1, 1959 in the principal amount of $725,000;

A public hearing [1] on said declaration, as amended, having been held after appropriate notice; the record in this matter having been duly considered; and the Commission having filed its findings herein;

*It is ordered,* That such declaration, as amended, be and become effective forthwith, on the conditions, however:

(1) that the issue and sale of the aforesaid bonds shall be effected in compliance with the terms and conditions set forth in, and for the purposes represented by, said amended declaration;

(2) that within ten days after the issue and sale of the aforesaid bonds, the declarant shall file with this Commission a certificate of notification showing that the issuance and sale of the aforesaid bonds have been effected in accordance with the terms and conditions of, and for the purposes represented by, said amended declaration;

(3) that the Commission reserves jurisdiction over the payment of any fees or commissions for effecting the sale of such bonds.

By the Commission.

[SEAL] FRANCIS P. BRASSOR,
*Secretary.*

[F. R. Doc. 39-1212; Filed, April 11, 1939; 11:11 a. m.]

[1] 4 F. R. 1255 DI.